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BRIGHT LEGACY

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JONATHAN BROWN BRIGHT

of Waltham, Massachusetts, is to be expended for books for the College Library. The other half of the income is devoted to scholarships in Harvard University for the benefit of descendants of

HENRY BRIGHT, JR.,

who died at Watertown, Massachusetts, in 1686. In the absence of such descendants, other persons are eligible to the scholarships. The will requires that this announcement shall be made in every book added to the Library under its provisions.

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THE

WRITINGS OF

CHIEF JUSTICE MARSHALL

ON

THE FEDERAL CONSTITUTION.

THE

WRITINGS

OF

JOHN MARSHALL,

LATE

CHIEF JUSTICE OF THE UNITED STATES,

UPON

THE FEDERAL CONSTITUTION.

His proudest epitaph may be written in a line—'HERE LIES THE EXPOUNDER OF THE CONSTITUTION OF THE UNITED STATES.'"

Story's Discourse upon C. J. Marshall.

WASHINGTON, D. C.:
WILLIAM H. MORRISON.
1890

PRINTED FROM LAFAYETTE BARS

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1993

TO

THE PEOPLE OF THE UNITED STATES,

THIS COMPILATION

FROM THE WRITINGS OF ONE WHO DEVOTED HIS LIFE AND TALENTS TO ESTABLISH, EXPOUND, AND PERPETUATE

THE CONSTITUTION OF GOVERNMENT

BY WHICH THEIR SOLID INTEREST AND TRUE GLORY HAVE BEEN SO EMINENTLY PROMOTED,

IS

Respectfully Inscribed.

PREFACE.

THE writings of Chief Justice Marshall on the Federal Constitution possess a twofold value; as presenting the opinions of one who has been justly denominated "THE EXPOUNDER OF THE CONSTITUTION," and as comprehending the leading decisions of the Supreme Court of the United States on points of law arising under that instrument. The Editor of this volume has had two objects in view in its preparation; the one being, to place within the reach of all his fellow-citizens some of the best writings of one of the greatest and best men that have lived in America; the other, to enable every student of the Constitution of the United States to own those leading reports to which he is constantly referred by his text-books. In order to the completeness of the volume in this latter respect, the decisions of the Supreme Court, as delivered by other judges, prior to the death of Marshall, are brought together in an Appendix.

In the selection of cases the Editor has been obliged to use his discretion, that the volume might not be too bulky. He has rejected those cases in which some principle was decided that has since been superseded by positive provision (such as the case of *Chisholm* v.

Georgia, 2 Dallas, 419–480); those, also, in which a mere decision was given without the reasons producing it (for example, *Stuart* v. *Laird*, 1 Cranch, 299–309); those involving much common-law learning, and but slightly touching the Federal Constitution (as *Green* v. *Biddle*, 8 Wheaton, 1–108); and those relating rather to national than constitutional law (as *Brown* v. *United States*, 8 Cranch, 110–154). Dissenting opinions have, in general, been omitted; in *Houston* v. *Moore*, 5 Wheaton, 1, that by Mr. Justice Story is retained, being an expression of Marshall's view, as well as his own, upon a somewhat dark point; and in *Ogden* v. *Saunders*, 12 Wheaton, 213, the dissenting opinion of the Chief Justice himself is given, for obvious reasons. Three decisions made by the Chief Justice upon the Circuit are included in the volume; and also one of the Supreme Court not upon a constitutional point,—that of *Johnson* v. *M'Intosh;* in which last the peculiar power of Judge Marshall appears so fully as to make it come properly within this collection.

To the kindness and assistance of Mr. Justice Story the Editor owes his success in procuring the publication of this volume; and to him, though he is in no degree responsible for the faults in its preparation, the thanks of the community are due, if this compilation shall be found useful.

TABLE OF CASES.

WILLIAM MARBURY *v.* JAMES MADISON. 1

When a commission has been signed by the president the appointment of the officer commissioned is made; and the commission is complete when the seal of the United States has been affixed to it by the secretary of state. To withhold a commission thus complete is a violation of a vested legal right.

The supreme court of the United States has no authority to issue a writ of *mandamus*, commanding the secretary of state to deliver a paper; original jurisdiction in such cases not having been given by the constitution, and the act of congress, conferring that authority on this court, not being constitutional.

A law repugnant to the constitution is void.

THE UNITED STATES *v.* FISHER *et al.* 29

The law which gives the United States a preference over other creditors of a bankrupt is constitutional.

HEPBURN AND DUNDAS *v.* ELLZEY. 31

The District of Columbia is not a *state*, in the sense in which that word is used in the constitution of the United States. Consequently its citizens cannot maintain an action in the circuit court of the United States for the district of Virginia, under the judicial act of 1789, giving to circuit courts jurisdiction in suits between citizens of the state where the suit is brought and citizens of another state.

Ex parte BOLLMAN AND SWARTWOUT. 33

The supreme court may grant a writ of habeas corpus in order to examine into the cause of a commitment made by another court having power to commit and to bail.

Definition of Treason, in the sense of the constitution.

UNITED STATES *v.* AARON BURR. 53

In an indictment for treason, a special overt act of levying war must be laid, and the particular place in which that act was committed must also be laid; and the overt act, laid in the indictment, cannot on the trial be proved, without first proving the actual or legal presence of the accused, by two witnesses; nor can any merely corroborative evidence be admitted, to connect the person accused with the supposed treasonable acts charged in the indictment, until some overt act of treason has been proved by two witnesses.

A person may be concerned in a treasonable conspiracy, and yet be legally, as well as actually, absent, while some one act of the treason is perpetrated.

A man who incites, aids or procures a treasonable act, is not, merely in consequence of that incitement, aid, or procurement, legally present when the act is committed.

Those only who perform a part, and are leagued in the conspiracy, are traitors. They must "perform a part," which will furnish the overt act, and they must be "leagued in the conspiracy."

THE BANK OF THE UNITED STATES *v.* DEVAUX *et al.* 112

The act of incorporation (passed 1791) conferred on this bank no right to sue in the federal courts. But a corporation aggregate, composed of citizens of one state, may sue a citizen of another state in the circuit courts of the United States.

In a question of jurisdiction, the court will look to the character of the individuals who compose the corporation, when a corporation is a party. The term "citizen" ought to be understood to describe the real persons who come into court under their corporate name.

THE UNITED STATES *v.* JUDGE PETERS. 119

The legislature of a state cannot annul the judgments, or determine the jurisdiction of the courts of the United States.

Although the *claims* of a state may be ultimately affected by the decision of a cause, yet, if the state be not necessarily a defendant, the courts of the United States may exercise jurisdiction.

FLETCHER *v.* PECK. 126

The legislature of Georgia passed an act authorizing a patent to issue granting a tract of land lying within the limits of that state. This act was not repugnant to the constitution of Georgia.

After the patent had been granted, the legislature repealed this act. This repeal was repugnant to the constitution of the United States; for it impaired the obligation of the contract implied in the patent.

When a law is, in its nature, a contract, and when absolute rights have vested under that contract, a repeal of that law cannot devest those rights.

The supreme court of the United States will not, in an action between two individuals upon a private contract, enter into an inquiry respecting the corruption of the sovereign power of a state.

THE UNITED STATES *v.* BEVANS. 142

A murder committed on board a ship of war, lying within the harbor of the city of Boston, is not cognizable in the circuit court for the district of Massachusetts.

STURGES *v.* CROWNINSHIELD. 147

A state may pass a bankrupt, or insolvent law, provided such law does not "impair the obligation of contracts." The power given to congress, by the constitution of the United States, "to establish uniform laws on the subject of bankruptcies," does not, until congress exercises that power, take from the states the right to pass bankrupt laws.

The insolvent act of New York (passed April 3, 1811) so far as it attempts to discharge a debtor from liabilities incurred prior to its enactment, is contrary to the constitution of the United States.

M'CULLOCH *v.* THE STATE OF MARYLAND *et al.* 160

The constitution of the United States, and the laws made in pursuance thereof are supreme; they control the constitutions and the laws of the respective states and cannot be controlled by them.

The act of congress (passed 1816), incorporating the Bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land.

The states have no power, by taxation, or otherwise, to retard, impede, burden or in any manner control, the operation of the constitutional laws enacted by congress to carry into execution the powers of the general government.

A law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

TRUSTEES OF DARTMOUTH COLLEGE *v.* WOODWARD. 188

The act incorporating the trustees of Dartmouth College, and the acceptance of that act, or charter, by the persons incorporated, constitute a *contract*, within the meaning of the constitution of the United States.

The acts of the legislature of New Hampshire, increasing the number of the trustees of that college, and taking from them the right of filling vacancies in their own number, impaired the obligation of this contract, and, therefore, were unconstitutional and void.

LOUGHBOROUGH *v.* BLAKE. 211

A direct tax may be laid and collected in the District of Columbia, it being apportioned according to the population; although that district is not represented in congress.

OWINGS *v.* SPEED *et al.* 218

The government established by the constitution of the United States did not commence its operations till the first Wednesday in March, 1789; and an act of a state legislature, passed before that time, could not be affected by the constitution of the United States.

COHENS *v.* THE STATE OF VIRGINIA. 221

A case arising under the constitution or laws of the United States is cognizable in the courts of the union, whoever may be the parties to the case. The mere circumstance, that a *state* is a party, gives jurisdiction to the federal courts.

When a state is a party to an action, the jurisdiction of the supreme court of the United States is original. When the case arises under the constitution, or a law of the United States, that jurisdiction is appellate.

JOHNSON AND GRAHAM'S LESSEE *v.* M'INTOSH. 262

The Indians cannot convey their lands in fee. The plaintiffs claimed land under a private purchase from the Indians; the defendant held under the United States. The plaintiff's title was adjudged to be void.

GIBBONS *v.* OGDEN. 287

The constitution of the United States contains an enumeration of the powers expressly granted by the people to their government. There is no known rule which requires that these powers should be construed *strictly*. The words of the constitution are to be construed in their *natural* sense.

"Congress shall have power to regulate *commerce*." The word *commerce* here comprehends *navigation*.

Carrying passengers is a part of the coasting business; and vessels licensed as coasting vessels may be employed in carrying passengers.

A steamboat may be licensed pursuant to an act of congress "for the enrolling and licensing of steamboats;" and an act of a state, inhibiting the use of steam to any vessel having a license, comes in direct collision with that act, and, of course, is void.

OSBORN *et al.* *v.* THE BANK OF THE UNITED STATES. 315

Congress has constitutional authority to give to the circuit courts of the United States original jurisdiction in any case to which the appellate jurisdiction extends.

The act incorporating the Bank of the United States (passed 1816) gives to the circuit courts of the United States jurisdiction of cases in which the bank is a party.

An act of the state of Ohio, laying a tax on the Bank of the United States, is repugnant to a law of the United States, made in pursuance of the constitution of the United States, and is, therefore, void.

THE BANK OF THE UNITED STATES *v.* THE PLANTERS' BANK OF GEORGIA. 343

The charter of the Bank of the United States gives to the bank a right to sue in the circuit courts of the United States, without regard to citizenship.

This action was brought in the circuit court of the United States on promissory notes, which had been assigned to the Bank of the United States. The payee could not have brought his action on these notes in the circuit court. The eleventh section of the judiciary act takes from the district and circuit courts cognizance of suits brought in favor of an assignee, in cases where the assignor could not have brought the suit in these courts. Yet the Bank of the United States may maintain this action in the circuit court; for it sues in virtue of a right conferred by its charter.

POSTMASTER GENERAL *v.* EARLY *et al.* 348

It is the duty of the postmaster general to sue, in his own name, for debts and balances due to the office which he superintends; and the circuit courts have jurisdiction in such cases.

The postmaster general may take bonds of his deputies and the officers in his department; at least, for the payment of balances in their hands, if not for the faithful performance of duties.

BROWN *et al.* *v.* THE STATE OF MARYLAND. 358

The act of the legislature of Maryland requiring importers of foreign articles, before selling the same, to take out a license, is repugnant to that article of the constitution of the United States which declares that "no state shall lay any imposts, or duties, on imports or exports;" and also to that clause in the constitution, which empowers congress "to regulate commerce with foreign nations, and among the several states."

AMERICAN INSURANCE COMPANY *et al.* *v.* CANTER. 373

The act of the territorial legislature of Florida (passed 1823), establishing a court consisting of a notary and five jurors, was constitutional.

The decree of this court, by virtue of which the cargo of a vessel, which had been wrecked on the coast of Florida, was sold to satisfy the salvors, was valid.

This court had jurisdiction of the case; and the sale made by its decree was a legal transfer of the property.

WESTON *et al.* *v.* CITY OF CHARLESTON. 382

A tax on government stock is a tax on the power to borrow money on the credit of the United States, and, consequently, repugnant to the constitution.

CRAIG *et al.* *v.* THE STATE OF MISSOURI. 390

The act of the state of Missouri (passed 1821) authorizing the issue of certificates of two per cent. stock, is repugnant to the constitution of the United States, which declares that "no state shall emit bills of credit." It is, therefore, void, and the certificates were not a valuable consideration for the note given on account of them by the plaintiffs in error.

PROVIDENCE BANK *v.* BILLINGS AND PITTMAN. 405

The act of the legislature of Rhode Island, imposing a tax on banks and bodies corporate, does not impair the obligation of the contract created by the charter granted to this bank.

THE CHEROKEE NATION *v.* THE STATE OF GEORGIA. 412

An Indian tribe, or nation, within the United States, is not a foreign state, in the sense in which that term is used in the constitution, and cannot maintain an action in the courts of the United States.

WORCESTER *v.* STATE OF GEORGIA. 419

The act of the legislature of Georgia, prohibiting white persons to reside within the limits of the Cherokee nation, without a license, and having taken an oath of a prescribed form, is repugnant to the treaties made between the United States and the Cherokees, as well as the acts of congress for giving effect to those treaties, and for regulating the intercourse of the citizens of the United States with the Cherokees, and therefore void; and the judgment against the plaintiff in error, on the trial of an indictment under this act, is a nullity, it having been pronounced under color of a law which is repugnant to the constitution, laws, and treaties of the United States.

The mere passing of this act was an assertion of a claim, on the part of Georgia, to jurisdiction over the Cherokee nation. But the Cherokee nation is a distinct community, occupying its own territory, in which the laws of Georgia can have no force.

BARRON *v.* THE MAYOR AND CITY COUNCIL OF BALTIMORE. 449

The provision in the fifth amendment of the constitution of the United States, which declares that private property shall not be taken for public use, without

just compensation, does not apply to the legislation of the states, but imposes limits on the powers of the general government only, no words being employed, which directly express the intent to apply the inhibition to state power.

THE BRIG WILSON *v.* THE UNITED STATES. 454

The act "to regulate the collection of duties on imports and tonnage" does not apply to privateers; these being included under the term "ship, or vessel of war," the commanders of which are exempted from making the report and entry required of the commanders of other vessels.

The power "to regulate commerce," &c., given to congress by art. 1, sec. 8, of the constitution of the United States, includes the power to regulate *navigation*.

The act of congress, February 28, 1803, prohibits *importing*, or *bringing in*, or *having on board*, any negro, mulatto, or any person of color. The words "*having on board*," do not apply to a vessel one of *whose crew* is a person of color; nor is any forfeiture incurred by having a person of color among the crew.

THE UNITED STATES *v.* MAURICE *et al.* 465

Though the office of agent of fortifications is an office established by law, the secretary of war has no authority to appoint such an officer. But, nevertheless, the bond of office given by an agent thus appointed is valid, and an action may be maintained on it to coerce the repayment of money received by such agent, and not disbursed by him in the performance of his duties.

HYLTON *v.* THE UNITED STATES. 489

The act of congress, passed in 1794, laying a duty on carriages for the conveyance of persons, was a constitutional act. The duty was not a *direct* tax.

CALDER AND WIFE *v.* BULL AND WIFE. 505

The resolution, or law, passed May, 1795, by the legislature of Connecticut, which set aside a decree of a court of probate for Hartford, and granted a new hearing by the said court of probate, was not an *ex post facto law*, within the meaning of the prohibition contained in the constitution of the United States, art. 1, sec. 10; but was constitutional and valid.

MARTIN *v.* HUNTER'S LESSEE. 525

The appellate power of the United States extends to cases pending in the state courts, and the twenty-fifth section of the judiciary act, which authorizes the exercise of this jurisdiction in the specified cases, by writ of error, is supported by the constitution.

THE BANK OF COLUMBIA *v.* OKELY. 555

A party to a contract may renounce a benefit, or right, secured to him by law.

Thus the maker of a note may agree (expressly, or by implication) that, upon non-payment, judgment may be rendered and execution issued for the debt, without a *trial by jury*.

HOUSTON *v.* MOORE. 560

Though the militia laws of the United States have provided that the offence of disobedience to the call of the president upon the militia shall be cognizable by a court martial of the United States, *exclusive* cognizance of such cases is not conferred upon such courts; but a state court martial may have concurrent jurisdiction of this offence with a court martial of the United States, to enforce the laws of congress against such delinquent.

A militia man, who refuses to obey the call of the president calling him into actual service, is not, in the sense of the act of 1795, "employed in the service of the United States," so as to be subject to the rules and articles of war; yet he is liable to be tried for the offence under the fifth section of that act, by a court martial under the authority of the United States.

THE UNITED STATES *v.* SMITH. 597

Definition of Piracy. The crime of piracy is sufficiently and constitutionally defined by the fifth section of the act of 1819.

ANDERSON *v.* DUNN. 602

The United States house of representatives has authority to punish, for contempt, persons who are not members of that house.

MARTIN *v.* MOTT. 610

The constitution of the United States declares that congress shall have power "to provide for calling forth the militia," &c. The act of congress of 1795 provides that it shall be lawful for the president of the United States to call forth the militia, &c., in certain specified cases.

The act of congress of 1795 is constitutional. The president has the sole authority to decide whether or not the exigency has arisen which justifies his calling out the militia.

The officer appointing a court martial, for the trial of a militia man who has disobeyed the call of the president, has a discretionary authority as to the number of which the court shall consist, and in this matter he is to proceed according to the general usage of the military service. The jurisdiction of a court martial to try such offences does not depend upon the fact of war or peace.

If the sentence of the court martial in such case need to be approved by any one, the approval by the president of the United States is sufficient.

OGDEN v. SAUNDERS. 622

A bankrupt law, which applies to contracts made after its passage, does not impair the obligation of those contracts—(per Justices Washington, Johnson, Trimble, and Thompson; Marshall, Duvall, and Story dissenting).

A discharge under a state bankrupt law is incompetent to discharge a debt due a citizen of another state.

MASON v. HAILE. 677

An act of the legislature of Rhode Island, reviving, in a particular case, an old insolvent law, and discharging a debtor from prison, was constitutional and valid.

SATTERLEE v. MATTHEWSON. 683

The constitution of the United States does not forbid the legislature of a state to exercise judicial functions. The supreme court of Pennsylvania had decided, that, under the title called "a Connecticut title," the relation of landlord and tenant could not exist. Immediately after this decision, the legislature of Pennsylvania passed a law enacting that the relation of landlord and tenant should exist under "a Connecticut title," as under any other. This law was not repugnant to the constitution of the United States.

MARSHALL'S CONSTITUTIONAL OPINIONS.

CONSTITUTIONAL OPINIONS

OF

CHIEF JUSTICE MARSHALL.

John Marshall received the appointment of chief justice of the United States on the 31st of January, 1801; he was appointed to that office by President Adams, with the unanimous approval of the Senate. He took his seat on the bench at the ensuing term of the supreme court; but no important case, involving a constitutional question, came before him until the February term of 1803. The first of that nature was the case of—

WILLIAM MARBURY *v.* JAMES MADISON.

FEBRUARY TERM, 1803.

[1 Cranch's Reports, 137–180.]

The facts of this case were as follows:—At the December term of the supreme court, 1801, William Marbury, by his counsel, moved the court for a rule to James Madison, secretary of state of the United States, calling upon him to show cause why a mandamus* should not issue, commanding him to

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* A rule to show cause why a *mandamus* shall not issue is, in other words, a notice from the court calling upon the person to whom it is sent to make known to the court any reason, if he have any, why he should not be *positively required* to do some desired thing. The writ is called a *mandamus*, from its first word, meaning, *we command*.

deliver to said Marbury his commission as justice of peace for the district of Columbia. In support of this motion for a rule, it was proved by affidavits that John Adams, late president of the United States, had nominated Marbury to the senate as justice of peace for the district; that the senate had approved the nomination; that a commission had, thereupon, been drawn up, signed by the president, and sealed with the seal of the United States; but that Mr. Madison refused to deliver the commission so signed and sealed.*

The rule was granted and served; but no cause was shown by Mr. Madison. A mandamus was then moved for. Upon this motion the chief justice delivered the opinion of the court on the 24th of February, 1803.

At the last term, on the affidavits then read and filed with the clerk, a rule was granted in this case, requiring the secretary of state to show cause why a mandamus should not issue, directing him to deliver to William Marbury his commission as a justice of the peace for the county of Washington, in the district of Columbia.

No cause has been shown, and the present motion is for a mandamus. The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles on which the opinion to be given by the court is founded.

These principles have been, on the side of the applicant, very ably argued at the bar. In rendering the opinion of the court there will be some departure in form, though not in substance, from the points stated in that argument.

In the order in which the court has viewed this subject, the following questions have been considered and decided:—

---

* The commission had not been delivered when Thomas Jefferson succeeded Mr. Adams in the presidential chair. Mr. Jefferson did not think the appointment complete until delivery of the commission, and directed his secretary of state not to deliver it. See Jefferson's Correspondence, vol. IV., p. 372, 2d ed.

1st. Has the applicant a right to the commission he demands?

2d. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

3d. If they do afford him a remedy, is it a mandamus issuing from this court?

The first object of inquiry is,—

1st. Has the applicant a right to the commission he demands?

His right originates in an act of congress, passed in February, 1801, concerning the district of Columbia.

After dividing the district into two counties, the eleventh section of this law enacts, "that there shall be appointed, in and for each of the said counties, such number of discreet persons to be justices of the peace as the president of the United States shall, from time to time, think expedient, to continue in office for five years."

It appears from the affidavits, that, in compliance with this law, a commission for William Marbury, as a justice of peace for the county of Washington, was signed by John Adams, then president of the United States; after which the seal of the United States was affixed to it; but the commission has never reached the person for whom it was made out.

In order to determine whether he is entitled to this commission, it becomes necessary to inquire whether he has been appointed to the office. For if he has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property.

The second section of the second article of the constitution declares that "the president shall nominate, and, by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers, and consuls, and all other officers of the United States whose appointments are not otherwise provided for."

The third section declares that "he shall commission all the officers of the United States."

An act of congress directs the secretary of state to keep the seal of the United States, "to make out and record, and affix the said seal to, all civil commissions to officers of the United States, to be appointed by the president, by and with the consent of the senate, or by the president alone; provided, that the said seal shall not be affixed to any commission before the same shall have been signed by the president of the United States."

These are the clauses of the constitution and laws of the United States which affect this part of the case. They seem to contemplate three distinct operations:—

1st. The nomination. This is the sole act of the president, and is completely voluntary.

2d. The appointment. This is also the act of the president, and is also a voluntary act, though it can only be performed by and with the advice and consent of the senate.

3d. The commission. To grant a commission to a person appointed might, perhaps, be deemed a duty enjoined by the constitution. "He shall," says that instrument, "commission all the officers of the United States."

The acts of appointing to office, and commissioning the person appointed, can scarcely be considered as one and the same; since the power to perform them is given in two separate and distinct sections of the constitution. The distinction between the appointment and the commission will be rendered more apparent by adverting to that provision, in the second section of the second article of the constitution, which authorizes congress "to vest by law the appointment of such inferior officers as they think proper in the president alone, in the courts of law, or in the heads of departments;" thus contemplating cases where the law may direct the president to commission an officer appointed by the courts, or by the heads of departments. In such a case, to issue a commission would be apparently a duty distinct from the appointment, the performance of which, perhaps, could not legally be refused.

Although that clause of the constitution, which requires the president to commission all the officers of the United States,

may never have been applied to officers appointed otherwise than by himself, yet it would be difficult to deny the legislative power to apply it to such cases. Of consequence, the constitutional distinction beween the appointment to an office and the commission of an officer who has been appointed remains the same as if, in practice, the president had commissioned officers appointed by an authority other than his own.

It follows, too, from the existence of this distinction, that, if an appointment was to be evidenced by any public act other than the commission, the performance of such public act would create the officer; and, if he was not removable at the will of the president, would either give him a right to his commission, or enable him to perform the duties without it.

These observations are premised solely for the purpose of rendering more intelligible those which apply more directly to the particular case under consideration.

This is an appointment made by the president, by and with the advice and consent of the senate, and is evidenced by no act but the commission itself. In such a case, therefore, the commission and the appointment seem inseparable; it being almost impossible to show an appointment otherwise than by proving the existence of a commission. Still, the commission is not necessarily the appointment, though conclusive evidence of it.

But at what stage does it amount to this conclusive evidence?

The answer to this question seems an obvious one. The appointment, being the sole act of the president, must be completely evidenced when it is shown that he has done everything to be performed by him.

Should the commission, instead of being evidence of an appointment, even be considered as constituting the appointment itself,—still, it would be made when the last act to be done by the president was performed, or, at furthest, when the commission was complete.

The last act to be done by the president is the signature of the commission. He has then acted on the advice and consent of the senate to his own nomination. The time for deliberation

1 Cr. 157.

has then passed. He has decided. His judgment, on the advice and consent of the senate concurring with his nomination, has been made, and the officer is appointed. This appointment is evidenced by an open, unequivocal act; and being the last act required from the person making it, necessarily excludes the idea of its being, so far as respects the appointment, an inchoate and incomplete transaction.

Some point of time must be taken when the power of the executive over an officer not removable at his will must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act required from the person possessing the power has been performed. This last act is the signature of the commission. This idea seems to have prevailed with the legislature when the act passed converting the department of foreign affairs into the department of state. By that act it is enacted, that the secretary of state shall keep the seal of the United States, "and shall make out and record, and shall affix the said seal to, all civil commissions to officers of the United States to be appointed by the president;" "provided, that the said seal shall not be affixed to any commission before the same shall have been signed by the president of the United States; nor to any other instrument or act without the special warrant of the president therefor."

The signature is a warrant for affixing the great seal to the commission; and the great seal is only to be affixed to an instrument which is complete. It attests, by an act supposed to be of public notoriety, the verity of the presidential signature.

It is never to be affixed till the commission is signed, because the signature, which gives force and effect to the commission, is conclusive evidence that the appointment is made.

The commission being signed, the subsequent duty of the secretary of state is prescribed by law, and not to be guided by the will of the president. He is to affix the seal of the United States to the commission, and is to record it.

This is not a proceeding which may be varied, if the judgment

1 Cr. 158.

of the executive shall suggest one more eligible, but is a precise course accurately marked out by law, and is to be strictly pursued. It is the duty of the secretary of state to conform to the law; and in this he is an officer of the United States, bound to obey the laws. He acts, in this respect, as has been very properly stated at the bar, under the authority of law, and not by the instructions of the president. It is a ministerial act which the law enjoins on a particular officer for a particular purpose.

If it should be supposed that the solemnity of affixing the seal is necessary not only to the validity of the commission, but even to the completion of an appointment, still, when the seal is affixed, the appointment is made and the commission is valid. No other solemnity is required by law; no other act is to be performed on the part of government. All that the executive can do to invest the person with his office is done; and unless the appointment be then made, the executive cannot make one without the co-operation of others.

After searching anxiously for the principles on which a contrary opinion may be supported, none have been found which appear of sufficient force to maintain the opposite doctrine.

Such as the imagination of the court could suggest have been very deliberately examined, and after allowing them all the weight which it appears possible to give them, they do not shake the opinion which has been formed.

In considering this question, it has been conjectured that the commission may have been assimilated to a deed, to the validity of which delivery is essential.

This idea is founded on the supposition that the commission is not merely evidence of an appointment, but is itself the actual appointment; a supposition by no means unquestionable. But for the purpose of examining this objection fairly, let it be conceded that the principle claimed for its support is established.

The appointment being, under the constitution, to be made by the president personally, the delivery of the deed of appointment, if necessary to its completion, must be made by the president also. It is not necessary that the delivery should be made

1 Cr. 159.

personally to the grantee of the office; it never is so made. The law would seem to contemplate that it should be made to the secretary of state, since it directs the secretary to affix the seal to the commission *after* it shall have been signed by the president. If, then, the act of livery be necessary to give validity to the commission, it has been delivered when executed and given to the secretary for the purpose of being sealed, recorded, and transmitted to the party.

But in all cases of letters patent certain solemnities are required by law, which solemnities are the evidences of the validity of the instrument. A formal delivery to the person is not among them. In cases of commissions, the sign manual of the president, and the seal of the United States, are those solemnities. This objection, therefore, does not touch the case.

It has also occurred as possible, and barely possible, that the transmission of the commission, and the acceptance thereof, might be deemed necessary to complete the right of the plaintiff.

The transmission of the commission is a practice directed by convenience, but not by law. It cannot, therefore, be necessary to constitute the appointment, which must precede it, and which is the mere act of the president. If the executive required that every person appointed to an office should himself take means to procure his commission, the appointment would not be the less valid on that account. The appointment is the sole act of the president; the transmission of the commission is the sole act of the officer to whom that duty is assigned, and may be accelerated or retarded by circumstances which can have no influence on the appointment. A commission is transmitted to a person already appointed; not to a person to be appointed or not, as the letter enclosing the commission should happen to get into the post-office and reach him in safety, or to miscarry.

It may have some tendency to elucidate this point, to inquire whether the possession of the original commission be indispensably necessary to authorize a person, appointed to any office, to perform the duties of that office. If it was necessary, then a loss of the commission would lose the office. Not only negli-

1 Cr. 160.

gence, but accident or fraud, fire or theft, might deprive an individual of his office. In such a case, I presume, it could not be doubted but that a copy from the record of the office of the secretary of state would be, to every intent and purpose, equal to the original. The act of congress has expressly made it so. To give that copy validity, it would not be necessary to prove that the original had been transmitted and afterwards lost. The copy would be complete evidence that the original had existed, and that the appointment had been made, but not that the original had been transmitted. If, indeed, it should appear that the original had been mislaid in the office of state, that circumstance would not affect the operation of the copy. When all the requisites have been performed which authorize a recording officer to record any instrument whatever, and the order for that purpose has been given, the instrument is, in law, considered as recorded, although the manual labor of inserting it in a book kept for that purpose may not have been performed.

In the case of commissions, the law orders the secretary of state to record them. When, therefore, they are signed and sealed, the order for their being recorded is given; and whether inserted in the book or not, they are, in law, recorded.

A copy of this record is declared equal to the original, and the fees to be paid by a person requiring a copy are ascertained by law. Can a keeper of a public record erase therefrom a commission which has been recorded? Or can he refuse a copy thereof to a person demanding it on the terms prescribed by law?

Such a copy would, equally with the original, authorize the justice of peace to proceed in the performance of his duty, because it would, equally with the original, attest his appointment.

If the transmission of a commission be not considered as necessary to give validity to an appointment, still less is its acceptance. The appointment is the sole act of the president; the acceptance is the sole act of the officer, and is, in plain common sense, posterior to the appointment. As he may resign, so may

1 Cr. 161.

he refuse to accept; but neither the one nor the other is capable of rendering the appointment a nonentity.

That this is the understanding of the government is apparent from the whole tenor of its conduct.

A commission bears date, and the salary of the officer commences, from his appointment; not from the transmission or acceptance of his commission. When a person appointed to any office refuses to accept that office, the successor is nominated in the place of the person who has declined to accept, and not in the place of the person who had been previously in office, and had created the original vacancy.

It is, therefore, decidedly the opinion of the court, that, when a commission has been signed by the president, the appointment is made; and that the commission is complete when the seal of the United States has been affixed to it by the secretary of state.

Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern; because the act is at any time revocable; and the commission may be arrested, if still in the office. But when the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed.

The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases where by law the officer is not removable by him. The right to the office is then in the person appointed, and he has the absolute, unconditional power of accepting or rejecting it.

Mr. Marbury, then, since his commission was signed by the president, and sealed by the secretary of state, was appointed; and as the law creating the office gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country.

To withhold his commission, therefore, is an act deemed by

1 Cr. 162.

the court not warranted by law, but violative of a vested legal right.

This brings us to the second inquiry; which is,—

2d. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.

In the third volume of his Commentaries, page 23, Blackstone states two cases in which a remedy is afforded by mere operation of law.

"In all other cases," he says, "it is a general and indisputable rule, that, where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded."

And afterwards, page 109 of the same volume, he says, "I am next to consider such injuries as are cognizable by the courts of the common law. And herein I shall for the present only remark that all possible injuries whatsoever, that did not fall within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals, are, for that very reason, within the cognizance of the common-law courts of justice; for it is a settled and invariable principle in the laws of England that every right when withheld must have a remedy, and every injury its proper redress."

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case.

It behoves us, then, to inquire whether there be in its composition any ingredient which shall exempt it from legal investigation, or exclude the injured party from legal redress. In pursu-

1 Cr. 163.

ing this inquiry, the first question which presents itself is, whether this can be arranged with that class of cases which come under the description of *damnum absque injuria*, a loss without an injury.

This description of cases never has been considered, and it is believed never can be considered, as comprehending offices of trust, of honor, or of profit. The office of justice of peace in the district of Columbia is such an office; it is, therefore, worthy of the attention and guardianship of the laws. It has received that attention and guardianship. It has been created by special act of congress, and has been secured, so far as the laws can give security, to the person appointed to fill it, for five years. It is not, then, on account of the worthlessness of the thing pursued that the injured party can be alleged to be without remedy.

Is it in the nature of the transaction? Is the act of delivering or withholding a commission to be considered as a mere political act, belonging to the executive department alone, for the performance of which entire confidence is placed by our constitution in the supreme executive; and for any misconduct respecting which the injured individual has no remedy?

That there may be such cases is not to be questioned; but that every act of duty, to be performed in any of the great departments of government, constitutes such a case is not to be admitted.

By the act concerning invalids, passed in June, 1794, (vol. 3, p. 112,) the secretary at war is ordered to place on the pension-list all persons whose names are contained in a report previously made by him to congress. If he should refuse to do so, would the wounded veteran be without remedy? Is it to be contended, that, where the law in precise terms directs the performance of an act in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? Is it to be contended that the heads of departments are not amenable to the laws of their country?

Whatever the practice on particular occasions may be, the

theory of this principle will certainly never be maintained. No act of the legislature confers so extraordinary a privilege, nor can it derive countenance from the doctrines of the common law. After stating that personal injury from the king to a subject is presumed to be impossible, Blackstone (vol. 3, p. 255) says, "But injuries to the rights of property can scarcely be committed by the crown without the intervention of its officers, for whom the law, in matters of right, entertains no respect or delicacy; but furnishes various methods of detecting the errors and misconduct of those agents by whom the king has been deceived and induced to do a temporary injustice."

By the act, passed in 1796, authorizing the sale of the lands above the mouth of Kentucky river, (vol. 3, p. 299,) the purchaser, on paying his purchase-money, becomes completely entitled to the property purchased; and on producing to the secretary of state the receipt of the treasurer, upon a certificate required by the law, the president of the United States is authorized to grant him a patent. It is further enacted that all patents shall be countersigned by the secretary of state and recorded in his office. If the secretary of state should choose to withhold this patent, or, the patent being lost, should refuse a copy of it, can it be imagined that the law furnishes to the injured person no remedy?

It is not believed that any person whatever would attempt to maintain such a proposition.

It follows, then, that the question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act.

If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction.

In some instances there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.

By the constitution of the United States the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to

1 Cr. 165.

his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders.

In such cases their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still, there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights; and being intrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certains acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

The conclusion from this reasoning is, that, where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy.

If this be the rule, let us inquire how it applies to the case under the consideration of the court.

The power of nominating to the senate, and the power of appointing the person nominated, are political powers, to be

1 Cr. 166.

exercised by the president according to his own discretion. When he has made an appointment he has exercised his whole power, and his discretion has been completely applied to the case. If, by law, the officer be removable at the will of the president, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed cannot be made never to have existed, the appointment cannot be annihilated; and consequently, if the officer is by law not removable at the will of the president, the rights he has acquired are protected by the law, and are not resumable by the president. They cannot be extinguished by executive authority; and he has the privilege of asserting them, in like manner as if they had been derived from any other source.

The question, whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority. If, for example, Mr. Marbury had taken the oaths of a magistrate, and proceeded to act as one, in consequence of which a suit had been instituted against him, in which his defence had depended on his being a magistrate, the validity of his appointment must have been determined by judicial authority.

So, if he conceives, that, by virtue of his appointment, he has a legal right either to the commission which has been made out for him, or to a copy of that commission, it is equally a question examinable in a court, and the decision of the court upon it must depend on the opinion entertained of his appointment.

That question has been discussed, and the opinion is that the latest point of time which can be taken as that at which the appointment was complete, and evidenced, was when, after the signature of the president, the seal of the United States was affixed to the commission.

It is, then, the opinion of the court,—

1st. That, by signing the commission of Mr. Marbury, the president of the United States appointed him a justice of peace for the county of Washington, in the district of Columbia; and that the seal of the United States, affixed thereto by the secretary of state, is conclusive testimony of the verity of the signature,

1 Cr. 167.

and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years.

2d. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which is a plain violation of that right for which the laws of his country afford him a remedy.

It remains to be inquired whether,—

3d. He is entitled to the remedy for which he applies. This depends on,—

1st. The nature of the writ applied for; and,—

2d. The power of this court.

1st. The nature of the writ.

Blackstone, in the third volume of his Commentaries, page 110, defines a *mandamus* to be "a command issuing in the king's name from the court of king's bench, and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some particular thing therein specified which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes, to be consonant to right and justice."

Lord Mansfield, in the case of The King *v.* Baker et al., (3 Burrow's Reports, 1266) states, with much precision and explicitness, the cases in which this writ may be used.

"Whenever," says that very able judge, "there is a right to execute an office, perform a service, or exercise a franchise, (more especially if it be in a matter of public concern, or attended with profit,) and a person is kept out of possession, or dispossessed of such right, and has no other specific legal remedy, this court ought to assist by mandamus, upon reasons of justice, as the writ expresses, and upon reasons of public policy, to preserve peace, order, and good government." In the same case he says, "This writ ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one."

In addition to the authorities now particularly cited, many

others were relied on at the bar, which show how far the practice has conformed to the general doctrines that have been just quoted.

This writ, if awarded, would be directed to an officer of government, and its mandate to him would be, to use the words of Blackstone, "to do a particular thing therein specified which appertains to his office and duty, and which the court has previously determined, or at least supposes, to be consonant to right and justice." Or, in the words of Lord Mansfield, the applicant in this case has a right to execute an office of public concern, and is kept out of possession of that right.

These circumstances certainly concur in this case.

Still, to render the mandamus a proper remedy, the officer to whom it is to be directed must be one to whom on legal principles such writ may be directed; and the person applying for it must be without any other specific and legal remedy.

1st. With respect to the officer to whom it would be directed. The intimate political relation subsisting between the president of the United States and the heads of departments necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received without much reflection or examination, and it is not wonderful that in such a case as this the assertion by an individual of his legal claims in a court of justice, to which claims it is the duty of that court to attend, should at first view be considered by some as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the executive.

It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance so absurd and excessive could not have been entertained for a moment. The province of the court is solely to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are by the constitution and laws submitted to the executive, can never be made in this court.

But if this be not such a question; if, so far from being an intrusion into the secrets of the cabinet, it respects a paper which according to law is upon record, and to a copy of which the law gives a right on the payment of ten cents; if it be no intermeddling with a subject over which the executive can be considered as having exercised any control; what is there in the exalted station of the officer which shall bar a citizen from asserting in a court of justice his legal rights, or shall forbid a court to listen to the claim, or to issue a mandamus directing the performance of a duty not depending on executive discretion, but on particular acts of congress and the general principles of law?

If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How, then, can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process?

It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined. Where the head of a department acts in a case in which executive discretion is to be exercised, in which he is the mere organ of executive will; it is again repeated, that any application to a court, to control, in any respect, his conduct, would be rejected without hesitation.

But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the president, and the performance of which the president cannot lawfully forbid, and therefore is never presumed to have forbidden; as, for example, to record a commission, or a patent for land, which has received all the legal solemnities; or to give a copy of such

1 Cr. 170.

record; in such cases, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department.

This opinion seems not now for the first time to be taken up in this country.

It must be well recollected that in 1792 an act passed directing the secretary at war to place on the pension-list such disabled officers and soldiers as should be reported to him by the circuit courts, which act, so far as the duty was imposed on the courts, was deemed unconstitutional; but some of the judges, thinking that the law might be executed by them in the character of commissioners, proceeded to act and to report in that character.

This law being deemed unconstitutional at the circuits was repealed, and a different system was established; but the question whether those persons who had been reported by the judges, as commissioners, were entitled, in consequence of that report, to be placed on the pension-list, was a legal question properly determinable in the courts, although the act of placing such persons on the list was to be performed by the head of a department.

That this question might be properly settled, congress passed an act, in February, 1793, making it the duty of the secretary of war, in conjunction with the attorney-general, to take such measures as might be necessary to obtain an adjudication of the supreme court of the United States on the validity of any such rights claimed under the act aforesaid.

After the passage of this act a mandamus was moved for, to be directed to the secretary at war, commanding him to place on the pension-list a person stating himself to be on the report of the judges.

There is, therefore, much reason to believe that this mode of trying the legal right of the complainant was deemed by the head of a department, and by the highest law-officer of the

1 Cr. 171.

United States, the most proper which could be selected for the purpose.

When the subject was brought before the court, the decision was not that a mandamus would not lie to the head of a department directing him to perform an act enjoined by law, in the performance of which an individual had a vested interest; but that a mandamus ought not to issue in that case; the decision necessarily to be made if the report of the commissioners did not confer on the applicant a legal right.

The judgment in that case is understood to have decided the merits of all claims of that description; and the persons on the report of the commissioners found it necessary to pursue the mode prescribed by the law subsequent to that which had been deemed unconstitutional, in order to place themselves on the pension-list.

The doctrine, therefore, now advanced is by no means a novel one.

It is true that the mandamus now moved for is not for the performance of an act expressly enjoined by statute.

It is to deliver a commission; on which subject the acts of congress are silent. This difference is not considered as affecting the case. It has already been stated that the applicant has to that commission a vested legal right, of which the executive cannot deprive him. He has been appointed to an office from which he is not removable at the will of the executive; and being so appointed, he has a right to the commission which the secretary has received from the president for his use. The act of congress does not indeed order the secretary of state to send it to him, but it is placed in his hands for the person entitled to it, and cannot be more lawfully withheld by him than by any other person.

It was at first doubted whether the action of detinue was not a specific legal remedy for the commission which has been withheld from Mr. Marbury; in which case a mandamus would be improper. But this doubt has yielded to the consideration that the judgment in detinue is for the thing itself, or its value. The

1 Cr. 172.

value of a public office not to be sold is incapable of being ascertained; and the applicant has a right to the office itself, or to nothing. He will obtain the office by obtaining the commission, or a copy of it from the record.

This, then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired,—

Whether it can issue from this court.

The act to establish the judicial courts of the United States authorizes the supreme court "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."

The secretary of state, being a person holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority and assigning the duties which its words purport to confer and assign.

The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall from time to time ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and, consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.

In the distribution of this power it is declared that "the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases the supreme court shall have appellate jurisdiction."

It has been insisted at the bar, that, as the original grant of jurisdiction to the supreme and inferior courts is general, and the clause assigning original jurisdiction to the supreme court contains no negative or restrictive words, the power remains to

1 Cr. 173.

the legislature to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction, where the constitution has declared it shall be appellate; the distribution of jurisdiction made in the constitution is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case a negative or exclusive sense must be given to them, or they have no operation at all.

It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.

If the solicitude of the convention respecting our peace with foreign powers induced a provision that the supreme court should take original jurisdiction in cases which might be supposed to affect them; yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the powers of congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as congress might make, is no restriction; unless the words be deemed exclusive of original jurisdiction.

When an instrument organizing fundamentally a judicial system divides it into one supreme and so many inferior courts as the legislature may ordain and establish; then enumerates its

1 Cr. 174.

powers, and proceeds so far to distribute them as to define the jurisdiction of the supreme court, by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction ; the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate ; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.

To enable this court, then, to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that, if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original.

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper is, in effect, the same as to sustain an original action for that paper, and therefore seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this to enable the court to exercise its appellate jurisdiction.

The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution ; and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

The question, whether an act repugnant to the constitution can become the law of the land, is a question deeply interesting to the United States ; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

1 Cr. 175.

That the people have an original right to establish, for their future government, such principles as in their opinion shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means; or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions con-

1 Cr. 176.

template them as forming the fundamental and paramount of the nation, and consequently the theory of every such ernment must be, that an act of the legislature repugnan the constitution is void.

This theory is essentially attached to a written constitut and is consequently to be considered by this court as on the fundamental principles of our society. It is not, there to be lost sight of in the further consideration of this subje

If an act of the legislature repugnant to the constitutio void, does it, notwithstanding its invalidity, bind the cou and oblige them to give it effect? Or, in other words, thoug be not law, does it constitute a rule as operative as if it a law? This would be to overthrow in fact what was es lished in theory; and would seem, at first view, an absurdity gross to be insisted on. It shall, however, receive a more at tive consideration.

It is emphatically the province and duty of the judicial partment to say what the law is. Those who apply the rul particular cases must of necessity expound and interpret rule. If two laws conflict with each other, the courts n decide on the operation of each.

So, if a law be in opposition to the constitution; if both law and the constitution apply to a particular case, so that court must either decide that case conformably to the law, di garding the constitution; or comformably to the constitution, regarding the law, the court must determine which of tl conflicting rules governs the case. This is of the very essenc judicial duty.

If, then, the courts are to regard the constitution, and constitution is superior to any ordinary act of the legislature, constitution, and not such ordinary act, must govern the to which they both apply.

Those, then, who controvert the principle that the constitu is to be considered in court as a paramount law, are reduce the necessity of maintaining that courts must close their eye the constitution, and see only the law.

1 Cr. 177.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which according to the principles and theory of our government is entirely void, is yet in practice completely obligatory. It would declare, that, if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favor of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution.

Could it be the intention of those who gave this power to say that in using it the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles exported from any state." Suppose a duty on the export of cotton, of tobacco, or of flour, and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law?

The constitution declares "that no bill of attainder or *ex post facto* law shall be passed."

1 Cr. 178.

If, however, such a bill should be passed, and a person should be prosecuted under it, must the court condemn to death those victims whom the constitution endeavors to preserve?

"No person," says the constitution, "shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the constitution is addressed especially to the courts. It prescribes directly for them a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these and many other selections which might be made, it is apparent that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as , according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

1 Cr. 179.

It is also not entirely unworthy of observation, that, in declaring what shall be the supreme law of the land, the constitution itself is first mentioned ; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

1 Cr. 180.

THE UNITED STATES v. FISHER AND OTHERS,

Assignees of Blight, a Bankrupt.

FEBRUARY TERM, 1805.

[2 Cranch's Reports, 358–405.]

This case involved two questions, one of which was constitutional; we give only so much of the opinion of the court as relates to this.

The question was as to the constitutionality of a law which gave the United States a preference over the other creditors of a bankrupt. Upon this the chief justice said,—

To the general observations made on this subject, it will only be observed, that as the court can never be unmindful of the solemn duty imposed on the judicial department when a claim is supported by an act which conflicts with the constitution, so the court can never be unmindful of its duty to obey laws which are authorized by that instrument.

In the case at bar the preference claimed by the United States is not prohibited; but it has been truly said, that, under a constitution conferring specific powers, the power contended for must be granted, or it cannot be exercised.

It is claimed under the authority to make all laws which shall be necessary and proper to carry into execution the powers vested by the constitution in the government of the United States, or in any department or officer thereof.

In construing this clause it would be incorrect, and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power.

Where various systems might be adopted for that purpose, it might be said with respect to each that it was not necessary,

because the end might be obtained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution.

The government is to pay the debt of the union, and must be authorized to use the means which appear to itself most eligible to effect that object. It has, consequently, a right to make remittances by bills or otherwise, and to take those precautions which will render the transaction safe.

This claim of priority on the part of the United States will, it has been said, interfere with the right of the state sovereignties respecting the dignity of debts, and will defeat the measures they have a right to adopt to secure themselves against delinquencies on the part of their own revenue officers.

But this is an objection to the constitution itself. The mischief suggested, so far as it can really happen, is the necessary consequence of the supremacy of the laws of the United States on all subjects to which the legislative power of congress extends.

2 Cr. 397.

HEPBURN AND DUNDAS v. ELLZEY.

FEBRUARY TERM, 1805.

[2 Cranch's Reports, 445–453.]

Hepburn and Dundas, who were citizens of the district of Columbia, sued Ellzey, who was a citizen of Virginia, in the United States' circuit court holden in the district of Virginia, and this question arose :—

"Are citizens of the district of Columbia citizens of a state within the meaning of the second section of the third article of the constitution of the United States ? "

The judges of the circuit court being opposed in opinion upon this question, it was brought before the supreme court ; the opinion of which was given by the chief justice, as follows :—

The question in this case is, whether the plaintiffs, as residents of the district of Columbia, can maintain an action in the circuit court of the United States for the district of Virginia.

This depends on the act of congress describing the jurisdiction of that court. That act gives jurisdiction to the circuit courts in cases between a citizen of the state in which the suit is brought and a citizen of another state. To support the jurisdiction in this case, therefore, it must appear that Columbia is a state.

On the part of the plaintiffs it has been urged that Columbia is a distinct political society, and is therefore "a state," according to the definitions of writers on general law.

This is true. But as the act of congress obviously uses the word "state" in reference to that term as used in the constitution, it becomes necessary to inquire whether Columbia is a state in the sense of that instrument. The result of that examination is a conviction that the members of the American confederacy only are the states contemplated in the constitution.

2 Cr. 452.

The house of representatives is to be composed of members chosen by the people of the several states ; and each state shall have at least one representative.

The senate of the United States shall be composed of two senators from each state.

Each state shall appoint for the election of the executive a number of electors equal to its whole number of senators and representatives.

These clauses show that the word "state" is used in the constitution as designating a member of the union, and excludes from the term the signification attached to it by writers on the law of nations. When the same term, which has been used plainly in this limited sense, in the articles respecting the legislative and executive departments, is also employed in that which respects the judicial department, it must be understood as retaining the sense originally given to it.

Other passages from the constitution have been cited by the plaintiffs to show that the term "state" is sometimes used in its more enlarged sense. But on examining the passages quoted, they do not prove what was to be shown by them.

It is true, that, as citizens of the United States, and of that particular district which is subject to the jurisdiction of congress, it is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the union, should be closed upon them. But this is a subject for legislative, not for judicial consideration.

The opinion to be certified to the circuit court is, that that court has no jurisdiction in the case.

2 Cr. 453.

*Ex parte** BOLLMAN AND SWARTWOUT.

FEBRUARY TERM, 1807.

[4 Cranch's Reports, 75–137.]

The circuit court for the district of Columbia having committed to prison Erick Bollman and Samuel Swartwout on a charge of treason against the United States ; C. Lee moved the supreme court for a writ of habeas corpus,† directed to the marshal of the district of Columbia, ordering him to bring said Bollman and Swartwout before the supreme court, that the cause of their commitment might be inquired into. The first question was whether the supreme court was empowered to grant a writ of habeas corpus in such a case ; upon this the chief justice delivered the opinion of the court as follows :—

As preliminary to any investigation of the merits of this motion, this court deems it proper to declare that it disclaims all jurisdiction not given by the constitution, or by the laws of the United States.

Courts which originate in the common law possess a jurisdiction which must be regulated by their common law, until some statute shall change their established principles ; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. It is unnecessary to state the reasoning on which this opinion is founded, because it has been repeatedly given by this court ; and with the decisions heretofore rendered on this point no

* *Ex parte* proceedings are those in which only one party appears.

† This writ brings any person in confinement before the proper court, and calls upon the one who holds the person in durance to show the ground whereon he does so.—To move the court for a rule or writ is merely to ask for it.

member of the bench has, even for an instant, been dissatisfied. The reasoning from the bar in relation to it may be answered by the single observation, that for the meaning of the term habeas corpus resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States must be given by written law.

This opinion is not to be considered as abridging the power of courts over their own officers, or to protect themselves and their members from being disturbed in the exercise of their functions. It extends only to the power of taking cognizance of any question between the individuals, or between government and individuals.

To enable the court to decide on such question, the power to determine it must be given by written law.

The inquiry, therefore, on this motion will be, whether by any statute, compatible with the constitution of the United States, the power to award a writ of habeas corpus, in such a case as that of Erick Bollman and Samuel Swartwout, has been given to this court.

The fourteenth section of the judicial act (Laws U. S. vol. 1, p. 58.) has been considered as containing a substantive grant of this power.

It is in these words: "That all the before mentioned courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs, not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment. Provided, that writs of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

The only doubt of which this section can be susceptible is, whether the restrictive words of the first sentence limit the power to the award of such writs of habeas corpus as are necessary to enable the courts of the United States to exercise their respective jurisdictions in some cause which they are capable of finally deciding.

It has been urged, that, in strict grammatical construction, these words refer to the last antecedent, which is, "all other writs not specially provided for by statute."

This criticism may be correct, and is not entirely without its influence; but the sound construction which the court thinks it safer to adopt is, that the true sense of the words is to be determined by the nature of the provision, and by the context.

It may be worthy of remark that this act was passed by the first congress of the United States, sitting under a constitution which had declared "that the privilege of the writ of habeas corpus should not be suspended, unless when, in cases of rebellion or invasion, the public safety might require it."

Acting under the immediate influence of this injunction, they must have felt with peculiar force the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would not be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give to all the courts the power of awarding writs of habeas corpus.

It has been truly said that this is a generic term, and includes every species of that writ. To this it may be added, that, when used singly,—when we say, *the writ of habeas corpus*, without addition,—we most generally mean that great writ which is now applied for; and in that sense it is used in the constitution.

The section proceeds to say that "either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment."

It has been argued that congress could never intend to give

a power of this kind to one of the judges of this court, which is refused to all of them when assembled.

There is certainly much force in this argument, and it receives additional strength from the consideration, that, if the power be denied to this court, it is denied to every other court of the United States; the right to grant this important writ is given in this sentence to every judge of the circuit or district court, but can neither be exercised by the circuit nor district court. It would be strange if the judge, sitting on the bench, should be unable to hear a motion for this writ where it might be openly made and openly discussed, and might yet retire to his chamber, and in private receive and decide upon the motion. This is not consistent with the genius of our legislation, nor with the course of our judicial proceedings. It would be much more consonant with both that the power of the judge at his chambers should be suspended during his term than that it should be exercised only in secret.

Whatever motives might induce the legislature to withhold from the supreme court the power to award the great writ of habeas corpus, there could be none which would induce them to withhold it from every court in the United States; and as it is granted to all in the same sentence and by the same words, the sound construction would seem to be that the first sentence vests this power in all the courts of the United States; but as those courts are not always in session, the second sentence vests it in every justice or judge of the United States.

The doubt which has been raised on this subject may be further explained by examining the character of the various writs of habeas corpus, and selecting those to which this general grant of power must be restricted, if taken in the limited sense of being merely used to enable the court to exercise its jurisdiction in causes which it is enabled to decide finally.

The various writs of habeas corpus, as stated and accurately defined by Judge Blackstone (Commentaries, vol. 3, p. 129), are, 1st. The writ of habeas corpus *ad respondendum*, "when a man hath a cause of action against one who is confined by the pro-

cess of some inferior court; in order to remove the prisoner and charge him with this new action in the court above."

This case may occur when a party having a right to sue in this court (as a state at the time of the passage of this act, or a foreign minister) wishes to institute a suit against a person who is already confined by the process of an inferior court. This confinement may be either by the process of a court of the United States, or of a state court. If it be in a court of the United States, this writ would be inapplicable, because perfectly useless, and consequently could not be contemplated by the legislature. It would not be required, in such case, to bring the body of the defendant actually into court, as he would already be in the charge of the person, who, under an original writ from this court, would be directed to take him into custody, and would already be confined in the same jail in which he would be confined under the process of this court, if he should be unable to give bail.

If the party should be confined by process from a state court, there are many additional reasons against the use of this writ in such a case.

The state courts are not, in any sense of the word, inferior courts, except in the particular cases in which an appeal lies from their judgment to this court; and in these cases the mode of proceeding is particularly prescribed, and is not by habeas corpus. They are not inferior courts, because they emanate from a different authority, and are the creatures of a distinct government.

2d. The writ of habeas corpus *ad satisfaciendum*, "when a prisoner hath had judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him with process of execution."

This case can never occur in the courts of the United States. One court never awards execution on the judgment of another. Our whole judicial system forbids it.

3d. *Ad prosequendum, testificandum, deliberandum*, &c., "which issue when it is necessary to remove a prisoner, in order to prose-

4 Cr. 97.

cute, or bear testimony, in any court, or to be tried in the proper jurisdiction wherein the fact was committed."

This writ might unquestionably be employed to bring up a prisoner to bear testimony in a court, consistently with the most limited construction of the words in the act of congress; but the power to bring a person up that he may be tried in the proper jurisdiction is understood to be the very question now before the court.

4th, and last. The common writ *ad faciendum et resipiendum* "which issues out of any of the courts of Westminster Hall, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior court, commanding the inferior judges to produce the body of the defendant, together with the day and cause of his caption and detainer, (whence the writ is frequently denominated an habeas corpus *cum causa*.) to do and receive whatever the king's court shall consider in that behalf. This writ is grantable of common right, without any motion in court, and it instantly supersedes all proceedings in the court below."

Can a solemn grant of power to a court to award a writ be considered as applicable to a case in which that writ, if issuable at all, issues by law without the leave of the court?

It would not be difficult to demonstrate that the writ of habeas corpus *cum causa* cannot be the particular writ contemplated by the legislature in the section under consideration; but it will be sufficient to observe generally, that the same act prescribes a different mode for bringing into the courts of the United States suits brought in a state court against a person having a right to claim the jurisdiction of the courts of the United States. He may, on his appearance, file his petition and authenticate the fact, upon which the cause is *ipso facto* removed into the courts of the United States.

The only power, then, which on this limited construction would be granted by the section under consideration, would be that of issuing writs of habeas corpus *ad testificandum*. The section itself proves that this was not the intention of the legis-

lature. It concludes with the following proviso, "That writs of habeas corpus shall in no case extend to prisoners in gaol unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

This proviso extends to the whole section. It limits the powers previously granted to the courts, because it specifies a case in which it is particularly applicable to the use of the power by courts—where the person is necessary to be brought into court to testify. That construction cannot be a fair one which would make the legislature except from the operation of a proviso, limiting the express grant of a power, the whole power intended to be granted.

From this review of the extent of the power of awarding writs of habeas corpus, if the section be construed in its restricted sense; from a comparison of the nature of the writ which the courts of the United States would, on that view of the subject, be enabled to issue; from a comparison of the power so granted with the other parts of the section, it is apparent that this limited sense of the term cannot be that which was contemplated by the legislature.

But the thirty-third section throws much light upon this question. It contains these words: "And upon all arrests in criminal cases bail shall be admitted, except where the punishment may be death; in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and of the usages of law."

The appropriate process of bringing up a prisoner, not committed by the court itself, to be bailed, is by the writ now applied for. Of consequence, a court possessing the power to bail prisoners not committed by itself may award a writ of habeas corpus for the exercise of that power. The clause under consideration obviously proceeds on the supposition that

4 Cr. 99.

this power was previously given, and is explanatory of the fourteenth section.

If, by the sound construction of the act of congress, the power to award writs of habeas corpus in order to examine into the cause of commitment is given to this court, it remains to inquire whether this be a case in which the writ ought to be granted.

The only objection is, that the commitment has been made by a court having power to commit and to bail.

Against this objection the argument from the bar has been so conclusive that nothing can be added to it.

If then this were *res integra*, the court would decide in favor of the motion. But the question is considered as long since decided. The case of Hamilton is expressly in point in all its parts; and although the question of jurisdiction was not made at the bar, the case was several days under advisement, and this question could not have escaped the attention of the court. From that decision the court would not lightly depart. (United States *v.* Hamilton, 3 Dallas's Reports, 17.)

If the act of congress gives this court the power to award a writ of habeas corpus in the present case, it remains to inquire whether that act be compatible with the constitution.

In the mandamus case, Marbury *v.* Madison, (1 Cranch's Reports, 175,) it was decided that this court would not exercise original jurisdiction, except so far as that jurisdiction was given by the constitution. But so far as that case has distinguished between original and appellate jurisdiction, that which the court is now asked to exercise is clearly appellate. It is the revision of a decision of an inferior court, by which a citizen has been committed to jail.

It has been demonstrated at the bar that the question brought forward on a habeas corpus is always distinct from that which is involved in the cause itself. The question whether the individual shall be imprisoned is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried, and therefore these questions are separated, and may be decided in different courts.

The decision that the individual shall be imprisoned must always precede the application for a writ of habeas corpus, and this writ must always be for the purpose of revising that decision, and therefore appellate in its nature.

But this point also is decided in Hamilton's case, and in Burford's case.*

If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so.

That question depends on political considerations, on which the legislature is to decide. Until the legislature will be expressed, this court can only see its duty, and must obey the laws.

The motion, therefore, must be granted.

The marshal of the district having, in accordance with the writ of habeas corpus, shown the order of the circuit court for the committal of the prisoners, Mr. Lee then moved that they should be discharged or admitted to bail; the main grounds for this motion are examined in the opinion of the court, delivered by the chief justice in these words:—

The prisoners having been brought before this court on a writ of habeas corpus, and the testimony on which they were committed having been fully examined and attentively considered, the court is now to declare the law upon their case.

This being a mere inquiry, which, without deciding upon guilt, precedes the institution of a prosecution, the question to be determined is whether the accused shall be discharged or held to trial; and if the latter, in what place they are to be tried, and whether they shall be confined or admitted to bail. "If," says a very learned and accurate commentator, "upon this inquiry, it manifestly appears that no such crime has been committed, or that the suspicion entertained of the prisoner was

* At February term, 1806, at this court.

4 Cr. 125.

wholly groundless, in such cases only is it lawful totally to discharge him. Otherwise he must either be committed to prison or give bail."

The specific charge brought against the prisoners is treason in levying war against the United States.

As there is no crime which can more excite and agitate the passions of men than treason, no charge demands more from the tribunal before which it is made a deliberate and temperate inquiry. Whether this inquiry be directed to the fact or to the law, none can be more solemn, none more important to the citizen or to the government; none can more affect the safety of both.

To prevent the possibility of those calamities which result from the extension of treason to offences of minor importance, that great fundamental law which defines and limits the various departments of our government has given a rule on the subject, both to the legislature and the courts of America, which neither can be permitted to transcend.

"Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort."

To constitute that specific crime for which the prisoners now before the court have been committed, war must be actually levied against the United States. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offences. The first must be brought into operation by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed. So far has this principle been carried, that, in a case reported by Ventris and mentioned in some modern treatises on criminal law, it has been determined that the actual enlistment of men to serve against the government does not amount to levying war. It is true that in that case the soldiers enlisted were to serve without the realm, but they were enlisted within it; and if the establishment for a treasonable

4 Cr. 126.

purpose could amount to levying war, then war had been actually levied.

It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war actually be levied, that is, if a body of men be actually assembled for the purpose of affecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an actual assembling of men for the treasonable purpose to constitute a levying of war.

Crimes so atrocious, as those which have for their object the subversion by violence of those laws and those institutions which have been ordained in order to secure the peace and happiness of society, are not to escape punishment because they have not ripened into treason. The wisdom of the legislature is competent to provide for the case; and the framers of our constitution, who not only defined and limited the crime, but with jealous circumspection attempted to protect their limitation by providing that no person should be convicted of it, unless on the testimony of two witnesses to the same overt act, or on confession in open court, must have conceived it more safe that punishment in such cases should be ordained by general laws, formed upon deliberation, under the influence of no resentments, and without knowing on whom they were to operate, than that it should be inflicted under the influence of those passions which the occasion seldom fails to excite, and which a flexible definition of the crime, or a construction which would render it flexible, might bring into operation. It is therefore more safe, as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition should receive such punishment as the legislature in its wisdom may provide.

To complete the crime of levying war against the United

4 Cr. 127.

States, there must be an actual assemblage of men for the purpose of executing a treasonable design. In the case now before the court, a design to overturn the government of the United States in New Orleans by force would have been unquestionably a design, which, if carried into execution, would have been treason; and the assemblage of a body of men for the purpose of carrying it into execution would amount to a levying of war against the United States; but no conspiracy for this object, no enlisting of men to effect it, would be an actual levying of war.

In conformity with the principles now laid down have been the decisions heretofore made by the judges of the United States.

The opinions given by Judge Patterson and Judge Iredell in cases before them imply an actual assembling of men, though they rather designed to remark on the purpose to which the force was to be applied than on the nature of the force itself. Their opinions, however, contemplate the actual employment of force.

Judge Chase, in the trial of Fries, was more explicit.

He stated the opinion of the court to be, "that, if a body of people conspire and meditate an insurrection to resist or oppose the execution of any statute of the United States by force, they are only guilty of a high misdemeanor; but if they proceed to carry such intention into execution by force, that they are guilty of the treason of levying war; and the quantum of the force employed neither lessens nor increases the crime; whether by one hundred, or one thousand persons, is wholly immaterial." "The court are of opinion," continued Judge Chase on that occasion, "that a combination or conspiracy to levy war against the United States is not treason, unless combined with an attempt to carry such combination or conspiracy into execution; some actual force or violence must be used in pursuance of such design to levy war; but it is altogether immaterial whether the force used is sufficient to effectuate the object; any force connected with the intention will constitute the crime of levying war."

The application of these general principles to the particular case before the court will depend on the testimony which has been exhibited against the accused.

4 Cr. 128.

The first deposition to be considered is that of General Eaton. This gentleman connects in one statement the purport of numerous conversations held with Colonel Burr throughout the last winter. In the course of these conversations were communicated various criminal projects which seem to have been revolving in the mind of the projector. An expedition against Mexico seems to have been the first and most matured part of his plan, if, indeed, it did not constitute a distinct and separate plan, upon the success of which other schemes still more culpable, but not yet well digested, might depend. Maps and other information preparatory to its execution, and which would rather indicate that it was the immediate object, had been procured, and for a considerable time, in repeated conversations, the whole efforts of Colonel Burr were directed to prove to the witness, who was to have held a high command under him, the practicability of the enterprise, and in explaining to him the means by which it was to be effected.

This deposition exhibits the various schemes of Colonel Burr, and its materiality depends on connecting the prisoners at the bar in such of those schemes as were treasonable. For this purpose the affidavit of General Wilkinson, comprehending in its body the substance of a letter from Colonel Burr, has been offered, and was received by the circuit court. To the admission of this testimony great and serious objections have been made. It has been urged that it is a voluntary or rather an extra-judicial affidavit, made before a person not appearing to be a magistrate, and contains the substance only of a letter, of which the original is retained by the person who made the affidavit.

The objection that the affidavit is extra-judicial resolves itself into the question, whether one magistrate may commit on an affidavit taken before another magistrate. For if he may, an affidavit made as the foundation of a commitment ceases to be extra-judicial, and the person who makes it would be as liable to a prosecution for perjury as if the warrant of commitment had been issued by the magistrate before whom the affidavit was made.

4 Cr. 129.

To decide that an affidavit made before one magistrate would not justify a commitment by another might in many cases be productive of great inconvenience, and does not appear susceptible of abuse, if the verity of the certificate be established. Such an affidavit seems admissible on the principle that before the accused is put upon his trial all the proceedings are *ex parte*. The court therefore overrule this objection.

That, which questions the character of the person who has, on this occasion, administered the oath, is next to be considered.

The certificate from the office of the department of state has been deemed insufficient by the counsel for the prisoners, because the law does not require the appointment of magistrates for the territory of New Orleans to be certified to that office; because the certificate is in itself informal; and because it does not appear that the magistrate had taken the oath required by the act of congress.

The first of these objections is not supported by the law of the case; and the second may be so readily corrected that the court has proceeded to consider the subject as if it were corrected, retaining, however, any final decision, if against the prisoners, until the correction shall be made. With regard to the third, the magistrate must be presumed to have taken the requisite oaths, since he is found acting as a magistrate.

On the admissibility of that part of the affidavit which purports to be as near the substance of the letter from Colonel Burr to General Wilkinson as the latter could interpret it, a division of opinion has taken place in the court. Two judges are of opinion, that, as such testimony delivered in the presence of the prisoner on his trial would be totally inadmissible, neither can it be considered as a foundation for a commitment. Although in making a commitment the magistrate does not decide on the guilt of the prisoner, yet he does decide on the probable cause, and a long and painful imprisonment may be the consequence of his decision. This probable cause, therefore, ought to be proved by testimony in itself legal, and which, though

from the nature of the case it must be *ex parte*, ought in most other respects to be such as a court and jury might hear.

Two judges are of opinion, that, in this incipient stage of the prosecution, an affidavit stating the general purport of a letter may be read, particularly where the person in possession of it is at too great a distance to admit of its being obtained, and that a commitment may be founded on it.

Under this embarrassment it was deemed necessary to look into the affidavit for the purpose of discovering, whether, if admitted, it contains matter that would justify the commitment of the prisoners at the bar on the charge of treason.

That the letter from Colonel Burr to General Wilkinson relates to a military enterprise meditated by the former has not been questioned. If this enterprise was against Mexico, it would amount to a high misdemeanor; if against any of the territories of the United States, or if in its progress the subversion of the government of the United States, in any of their territories, was a mean clearly and necessarily to be employed, if such mean formed a substantive part of the plan, the assemblage of a body of men to effect it would be levying war against the United States.

The letter is in language which furnishes no distinct view of the design of the writer. The co-operation, however, which is stated to have been secured, points strongly to some expedition against the territories of Spain. After making these general statements, the writer becomes rather more explicit, and says, "Burr's plan of operations is to move down rapidly from the falls on the 15th of November, with the first five hundred or one thousand men in light boats, now constructing for that purpose; to be at Natchez between the 5th and 15th of December, there to meet Wilkinson; then to determine whether it will be expedient in the first instance to seize on, or to pass by, Baton Rouge. The people of the country to which we are going are prepared to receive us. Their agents now with Burr say that if we will protect their religion, and will not subject them to a foreign power, in three weeks all will be settled."

4 Cr. 131.

There is no expression in these sentences which would justify a suspicion that any territory of the United States was the object of the expedition.

For what purpose seize on Baton Rouge; why engage Spain against this enterprise, if it was designed against the United States?

"The people of the country to which we are going are prepared to receive us." This language is peculiarly appropriate to a foreign country. It will not be contended that the terms would be inapplicable to a territory of the United States, but other terms would more aptly convey the idea, and Burr seems to consider himself as giving information of which Wilkinson was not possessed. When it was recollected that he was the governor of a territory adjoining that which must have been threatened, if a territory of the United States was threatened, and that he commanded the army a part of which was stationed in that territory, the probability that the information communicated related to a foreign country, it must be admitted, gains strength.

"Their agents now with Burr say that if we will protect their religion, and will not subject them to a foreign power, in three weeks all will be settled."

This is apparently the language of a people, who, from the contemplated change in their political situation, feared for their religion, and feared that they would be made the subjects of a foreign power. That the Mexicans should entertain these apprehensions was natural, and would readily be believed. They were, if the representation made of their dispositions be correct, about to place themselves much in the power of men who professed a different faith from theirs, and who, by making them dependent on England or the United States, would subject them to a foreign power.

That the people of New Orleans, as a people, if really engaged in the conspiracy, should feel the same apprehensions, and require assurances on the same points, is by no means so obvious.

4 Cr. 132.

There certainly is not in the letter delivered to Gen. Wilkinson, so far as that letter is laid before the court, one syllable which has a necessary or a natural reference to an enterprise against any territory of the United States.

That the bearer of this letter must be considered as acquainted with its contents is not to be controverted. The letter and his own declarations evince the fact.

After stating himself to have passed through New York and the western states and territories, without insinuating that he had performed on his route any act whatever which was connected with the enterprise, he states their object to be, "to carry an expedition into the Mexican provinces."

This statement may be considered as explanatory of the letter of Col. Burr, if the expressions of that letter could be thought ambiguous.

But there are other declarations made by Mr. Swartwout, which constitute the difficulty of this case. On an inquiry from General Wilkinson, he said, "this territory would be revolutionized where the people were ready to join them, and that there would be some seizing, he supposed, at New Orleans."

If these words import that the government established by the United States in any of its territories was to be revolutionized by force, although merely as a step to, or a mean of executing, some greater projects, the design was unquestionably treasonable, and any assemblage of men for that purpose would amount to a levying of war. But on the import of the words a difference of opinion exists. Some of the judges suppose they refer to the territory against which the expedition was intended; others to that in which the conversation was held. Some consider the words, if even applicable to a territory of the United States, as alluding to a revolution to be effected by the people, rather than by the party conducted by Col. Burr.

But whether this treasonable intention be really imputable to the plan or not, it is admitted that it must have been carried into execution by an open assemblage of men for that purpose, previous to the arrest of the prisoner, in order to consummate

4 Cr. 133.

the crime as to him ; and a majority of the court is of opinion that the conversation of Mr. Swartwout affords no sufficient proof of such assembling.

The prisoner stated that "Col. Burr, with the support of a powerful association extending from New York to New Orleans, was levying an armed body of seven thousand men from the state of New York and the western states and territories, with a view to carry an expedition to the Mexican territories."

That the association, whatever may be its purpose, is not treason, has been already stated. That levying an army may or may not be treason, and that this depends on the intention with which it is levied, and on the point to which the parties have advanced, has been also stated. The mere enlisting of men, without assembling them, is not levying war. The question, then, is, whether this evidence proves Col. Burr to have advanced so far in levying an army as actually to have assembled them.

It is argued, that, since it cannot be necessary that the whole seven thousand men should have assembled, their commencing their march by detachments to the place of rendezvous must be sufficient to constitute the crime.

This position is correct, with some qualification. It cannot be necessary that the whole army should assemble, and that the various parts which are to compose it should have combined. But it is necessary that there should be an actual assemblage, and therefore the evidence should make the fact unequivocal.

The travelling of individuals to the place of rendezvous would, perhaps, not be sufficient. This would be an equivocal act, and has no warlike appearance. The meeting of particular bodies of men, and their marching from places of partial to a place of general rendezvous, would be such an assemblage.

The particular words used by Mr. Swartwout are, that Col. Burr " was levying an armed body of seven thousand men." If the term "levying" in this place imports that they were assembled, then such fact would amount, if the intention be against the United States, to levying war. If it barely im-

ports that he was enlisting or engaging them in his service, the fact would not amount to levying war.

It is thought sufficiently apparent that the latter is the sense in which the term was used. The fact alluded to, if taken in the former sense, is of a nature so to force itself upon the public view, that, if the army had then actually assembled, either together or in detachments, some evidence of such assembling would have been laid before the court.

The words used by the prisoner in reference to seizing at New Orleans, and borrowing, perhaps by force, from the bank, though indicating a design to rob, and consequently importing a high offence, do not designate the specific crime of levying war against the United States.

It is therefore the opinion of a majority of the court that in the case of Samuel Swartwout there is not sufficient evidence of his levying war against the United States to justify his commitment on the charge of treason.

Against Erick Bollman there is still less testimony. Nothing has been said by him to support the charge that the enterprise in which he was engaged had any other object than was stated in the letter of Colonel Burr. Against him, therefore, there is no evidence to support a charge of treason.

That both of the prisoners were engaged in a most culpable enterprise against the dominions of a power at peace with the United States those who admit the affidavit of General Wilkinson cannot doubt. But that no part of this crime was committed in the district of Columbia is apparent. It is therefore the unanimous opinion of the court that they cannot be tried in this district.

The law read on the part of the prosecution is understood to apply only to offences committed on the high seas, or in any river, haven, basin, or bay, not within the jurisdiction of any particular state. In those cases there is no court which has particular cognizance of the crime, and therefore the place in which the criminal shall be apprehended, or, if he be apprehended where no court has exclusive jurisdiction, that to which

4 Cr. 135.

he shall be first brought, is substituted for the place in which the offence was committed.

But in this case a tribunal for the trial of the offence, wherever it may have been committed, had been provided by congress; and at the place where the prisoners were seized by the authority of the commander in chief, there existed such a tribunal. It would, too, be extremely dangerous to say, that, because the prisoners were apprehended, not by a civil magistrate, but by the military power, there could be given by law a right to try the persons so seized in any place which the general might select, and to which he might direct them to be carried.

The act of congress which the prisoners are supposed to have violated describes as offenders those who begin, or set on foot, or provide, or prepare, the means for any military expedition or enterprise to be carried on from thence against the dominions of a foreign prince or state with whom the United States are at peace.

There is a want of precision in the description of the offence which might produce some difficulty in deciding what cases would come within it. But several other questions arise which a court consisting of four judges finds itself unable to decide, and therefore, as the crime with which the prisoners stand charged has not been committed, the court can only direct them to be discharged. This is done with the less reluctance because the discharge does not acquit them from the offence which there is probable cause for supposing they have committed; and if those whose duty it is to protect the nation, by prosecuting offenders against the laws, shall suppose those who have been charged with treason to be proper objects for punishment, they will, when possessed of less exceptional testimony, and when able to say at what place the offence has been committed, institute fresh proceedings against them.

4 Cr. 136.

UNITED STATES v. AARON BURR.

C. C. DISTR. VA., SUMMER TERM, 1807.

[4 Cranch's Reports, App., 470–507.]

In connexion with this case of Bollman and Swartwout we give the following opinion of Chief Justice Marshall, as delivered at the trial of Aaron Burr, before the United States' circuit court for the district of Virginia, on the 31st of August, 1807.

Certain acts which were supposed to amount to treason having been proved, evidence was offered for the purpose of connecting Colonel Burr with those who committed these acts, he having been at a distance from the scene of action; this evidence was objected to as irrelevant, and upon the question of its admission the chief justice gave the opinion of the court as follows:—*

The question now to be decided has been argued in a manner worthy of its importance, and with an earnestness evincing the strong conviction felt by the counsel on each side that the law is with them.

A degree of elequence seldom displayed on any occasion has embellished a solidity of argument and a depth of research by which the court has been greatly aided in forming the opinion it is about to deliver.

The testimony adduced on the part of the United States, to prove the overt act laid in the indictment, having shown, and the attorney for the United States having admitted, that the prisoner was not present when the act, whatever may be its

* This opinion closes the second volume of the Washington edition of Burr's trial, 1808, and is at page 401 of the second volume of the Philadelphia edition of 1808. It is also contained in the Appendix to 4 Cranch's Reports, which is the copy here followed.

4 Cr. 470.

character, was committed, and there being no reason to doubt but that he was at a great distance, and in a different state, it is objected to the testimony offered on the part of the United States, to connect him with those who committed the overt act, that such testimony is totally irrelevant, and must therefore be rejected.

The arguments in support of this motion respect in part the merits of the case as it may be supposed to stand independent of the pleadings, and in part as exhibited by the pleadings.

On the first division of the subject two points are made.

1st. That, conformably to the constitution of the United States, no man can be convicted of treason who was not present when the war was levied.

2d. That, if this construction be erroneous, no testimony can be received to charge one man with the overt acts of others, until those overt acts, as laid in the indictment, be proved to the satisfaction of the court.

The question which arises on the construction of the constitution, in every point of view in which it can be contemplated, is of infinite moment to the people of this country and to their government, and requires the most temperate and the most deliberate consideration.

"Treason against the United States shall consist only in levying war against them."

What is the natural import of the words "levying war"? And who may be said to levy it? Had their first application to treason been made by our constitution, they would certainly have admitted of some latitude of construction. Taken most literally, they are, perhaps, of the same import with the words raising or creating war; but as those who join after the commencement are equally the objects of punishment, there would probably be a general admission that the term also comprehended making war, or carrying on war. In the construction which courts would be required to give these words, it is not improbable that those who should raise, create, make, or carry on war, might be comprehended. The various acts which would

be considered as coming within the term would be settled by a course of decisions, and it would be affirming boldly to say that those only who actually constituted a portion of the military force appearing in arms could be considered as levying war. There is no difficulty in affirming that there must be a war, or the crime of levying it cannot exist; but there would often be considerable difficulty in affirming that a particular act did or did not involve the person committing it in the guilt and in the fact of levying war. If, for example, an army should be actually raised for the avowed purpose of carrying on open war against the United States and subverting their government, the point must be weighed very deliberately before a judge would venture to decide that an overt act of levying war had not been committed by a commissary of purchases who never saw the army, but who, knowing its object, and leaguing himself with the rebels, supplied that army with provisions, or by a recruiting officer holding a commission in the rebel service, who, though never in camp, executed the particular duty assigned him.

But the term is not for the first time applied to treason by the constitution of the United States. It is a technical term. It is used in a very old statute of that country whose language is our language, and whose laws form the substratum of our laws. It is scarcely conceivable that the term was not employed by the framers of our constitution in the sense which had been affixed to it by those from whom we borrowed it. So far as the meaning of any terms, particularly terms of art, is completely ascertained, those by whom they are employed must be considered as employing them in that ascertained meaning, unless the contrary be proved by the context. It is therefore reasonable to suppose, unless it be incompatible with other expressions of the constitution, that the term "levying war" is used in that instrument in the same sense in which it was understood in England and in this country to have been used in the statute of the twenty-fifth of Edward III., from which it was borrowed.

It is said that this meaning is to be collected only from adjudged cases. But this position cannot be conceded to the extent

4 Cr. 471.

in which it is laid down. The superior authority of adjudged cases will never be controverted. But those celebrated elementary writers who have stated the principles of the law, whose statements have received the common approbation of legal men, are not to be disregarded. Principles laid down by such writers as Coke, Hale, Foster, and Blackstone, are not lightly to be rejected. These books are in the hands of every student. Legal opinions are formed upon them, and those opinions are afterwards carried to the bar, the bench, and the legislature. In the exposition of terms, therefore, used in instruments of the present day, the definitions and the dicta of those authors, if not contradicted by adjudications, and if compatible with the words of the statute, are entitled to respect. It is to be regretted that they do not shed as much light on this part of the subject as is to be wished.

Coke does not give a complete definition of the term, but puts cases which amount to levying war. "An actual rebellion or insurrection," he says, "is a levying of war." In whom? Coke does not say whether in those only who appear in arms, or in all those who take part in the rebellion or insurrection by real open deed.

Hale, in treating on the same subject, puts many cases which shall constitute a levying of war, without which no act can amount to treason; but he does not particularize the parts to be performed by the different persons concerned in that war, which shall be sufficient to fix on each the guilt of levying it.

Foster says: "The joining with rebels in an act of rebellion, or with enemies in acts of hostility, will make a man a traitor." "Furnishing rebels or enemies with money, arms, ammunition, or other necessaries, will prima facie make a man a traitor."

Foster does not say that he would be a traitor under the words of the statute, independent of the legal rule which attaches the guilt of the principal to an accessory, nor that his treason is occasioned by that rule. In England this discrimination need not be made except for the purpose of framing the indictment, and therefore in the English books we do not per-

4 Cr. 472.

ceive any effort to make it. Thus, surrendering a castle to rebels, being in confederacy with them, is said, by Hale and Foster, to be treason under the clause of levying war; but whether it be levying war in fact, or aiding those who levy it, is not said. Upon this point Blackstone is not more satisfactory. Although we may find among the commentators upon treason enough to satisfy the inquiry, What is a state of internal war? yet no precise information can be acquired from them which would enable us to decide with clearness, whether persons not in arms, but taking part in a rebellion, could be said to levy war, independent of that doctrine which attaches to the accessory the guilt of his principal.

If in adjudged cases this question has been taken up and directly decided, the court has not seen those cases. The arguments which may be drawn from the form of the indictment, though strong, are not conclusive. In the precedent found in Tremaine, Mary Speake, who was indicted for furnishing provisions to the party of the Duke of Monmouth, is indicted for furnishing provisions to those who were levying war, not for levying war herself. It may correctly be argued, that, had this act amounted to levying war, she would have been indicted for levying war, and the furnishing of provisions would have been laid as an overt act. The court felt this when the precedent was produced. But the argument, though strong, is not conclusive; because in England, the inquiry, whether she had become a traitor by levying war, or by giving aid and comfort to those who were levying war, was unimportant, and because, too, it does not appear from the indictment that she was actually concerned in the rebellion, that she belonged to the rebel party, or was guilty of anything further than a criminal speculation in selling them provisions.

It is not deemed necessary to trace the doctrine, that in treason all are principals, to its source. Its origin is most probably stated correctly by Judge Tucker, in a work the merit of which is with pleasure acknowledged. But if a spurious doctrine has been introduced into the common law, and has for centuries

4 Cr. 473.

been admitted as genuine, it would require great hardihood in a judge to reject it. Accordingly, we find those of the English jurists who seem to disapprove the principle declaring that it is now too firmly settled to be shaken.

It is unnecessary to trace this doctrine to its source, for another reason. The terms of the constitution comprise no question respecting principal and accessory, so far as either may be truly and in fact said to levy war. Whether in England a person would be indicted in express terms for levying war, or for assisting others in levying war, yet if, in correct and legal language, he can be said to have levied war, and if it has never been decided that the act would not amount to levying war, his case may, without violent construction, be brought within the letter and the plain meaning of the constitution.

In examining these words, the argument which may be drawn from felonies, as, for example, from murder, is not more conclusive. Murder is the single act of killing with malice aforethought. But war is a complex operation composed of many parts co-operating with each other. No one man, or body of men, can perform them all if the war be of any continuance. Although, then, in correct and in law-language, he alone is said to have murdered another who has perpetrated the fact of killing, or has been present aiding that fact, it does not follow that he alone can have levied war who has borne arms. All those who perform the various and essential military parts of prosecuting the war, which must be assigned to different persons, may with correctness and accuracy be said to levy war.

Taking this view of the subject, it appears to the court that those who perform a part in the prosecution of the war may correctly be said to levy war, and to commit treason under the constitution. It will be observed that this opinion does not extend to the case of a person who performs no act in the prosecution of the war, who counsels and advises it, or who, being engaged in the conspiracy, fails to perform his part. Whether such persons may be implicated by the doctrine that whatever would make a man an accessory in felony makes him a principal

4 Cr. 473.

in treason, or are excluded, because that doctrine is inapplicable to the United States, — the constitution having declared that treason shall consist only in levying war, and having made the proof of overt acts necessary to conviction, — is a question of vast importance, which it would be proper for the supreme court to take a fit occasion to decide, but which an inferior tribunal would not willingly determine, unless the case before them should require it.

It may now be proper to notice the opinion of the supreme court in the case of the United States against Bollman and Swartwout. It is said that this opinion, in declaring that those who do not bear arms may yet be guilty of treason, is contrary to law, and is not obligatory, because it is extra-judicial, and was delivered on a point not argued. This court is therefore required to depart from the principle there laid down.

It is true, that in that case, after forming the opinion that no treason could be committed, because no treasonable assemblage had taken place, the court might have dispensed with proceeding further in the doctrines of treason. But it is to be remembered that the judges might act separately, and perhaps at the same time, on the various prosecutions which might be instituted, and that no appeal lay from their decisions. Opposite judgments on the point would have presented a state of things infinitely to be deplored by all. It was not surprising, then, that they should have made some attempt to settle principles which would probably occur, and which were in some degree connected with the point before them.

The court had employed some reasoning to show that without the actual embodying of men war could not be levied. It might have been inferred from this that those only who were so embodied could be guilty of treason. Not only to exclude this inference, but also to affirm the contrary, the court proceeded to observe, "It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the

4 Cr. 474.

purpose of effecting by force a treasonable object, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors."

This court is told that if this opinion be incorrect it ought not to be obeyed, because it was extra-judicial. For myself, I can say that I could not lightly be prevailed on to disobey it, were I even convinced that it was erroneous; but I would certainly use any means which the law placed in my power to carry the question again before the supreme court, for reconsideration, in a case in which it would directly occur and be fully argued.

The court which gave this opinion was composed of four judges. At the time I thought them unanimous; but I have since had reason to suspect that one of them, whose opinion is entitled to great respect, and whose indisposition prevented his entering into the discussions on some of those points which were not essential to the decision of the very case under consideration, did not concur in this particular point with his brethren. Had the opinion been unanimous, it would have been given by a majority of the judges. But should the three who were absent concur with that judge who was present, and who perhaps dissents from what was then the opinion of the court, a majority of the judges may overrule this decision. I should therefore feel no objection, although I then thought, and still think, the opinion perfectly correct, to carry the point, if possible, again before the supreme court, if the case should depend upon it.

In saying that I still think the opinion perfectly correct, I do not consider myself as going further than the preceding reasoning goes. Some gentlemen have argued as if the supreme court had adopted the whole doctrine of the English books on the subject of accessories to treason. But certainly such is not the fact. Those only who perform a part, and who are leagued in the conspiracy, are declared to be traitors. To complete the definition both circumstances must concur. They must "perform a part" which will furnish the overt act, and they must be

4 Cr. 474.

"leagued in the conspiracy." The person who comes within this description, in the opinion if the court, levies war. The present motion, however, does not rest upon this point; for if under this indictment the United States might be let in to prove the part performed by the prisoner, if he did perform any part, the court could not stop the testimony in its present stage.

2d. The second point involves the character of the overt act which has been given in evidence, and calls upon the court to declare whether that act can amount to levying war. Although the court ought now to avoid any analysis of the testimony which has been offered in this case, provided the decision of the motion should not rest upon it, yet many reasons concur in giving peculiar propriety to a delivery, in the course of these trials, of a detailed opinion on the question. What is levying war? As this question has been argued at great length, it may probably save much trouble to the counsel now to give that opinion.

In opening the case it was contended by the attorney for the United States, and has since been maintained on the part of the prosecution, that neither arms, nor the application of force or violence, are indispensably necessary to constitute the fact of levying war. To illustrate these positions several cases have been stated, many of which would clearly amount to treason. In all of them, except that which was probably intended to be this case, and on which no observation will be made, the object of the assemblage was clearly treasonable; its character was unequivocal, and was demonstrated by evidence furnished by the assemblage itself; there was no necessity to rely upon information drawn from extrinsic sources, or, in order to understand the fact, to pursue a course of intricate reasoning and to conjecture motives. A force is supposed to be collected for an avowed treasonable object, in a condition to attempt that object, and to have commenced the attempt by moving towards it. I state these particulars, because although the cases put may establish the doctrine they are intended to support, may prove that the absence of arms, or the failure to apply force to sensible objects by the actual commission of violence on those objects,

4 Cr. 475.

may be supplied by other circumstances, yet they also serve to show that the mind requires those circumstances, to be satisfied that war is levied.

Their construction of the opinion of the supreme court is, I think, thus far correct. It is certainly the opinion which was at the time entertained by myself, and which is still entertained. If a rebel army, avowing its hostility to the sovereign power, should front that of the government, should march and countermarch before it, should manoeuvre in its face, and should then disperse, from any cause whatever, without firing a gun, I confess I could not without some surprise hear gentlemen seriously contend that this could not amount to an act of levying war. A case equally strong may be put with respect to the absence of military weapons. If the party be in a condition to execute the purposed treason without the usual implements of war, I can perceive no reason for requiring those implements in order to constitute the crime.

It is argued that no adjudged case can be produced from the English books where actual violence has not been committed. Suppose this were true. No adjudged case has, or, it is believed, can be produced from those books in which it has been laid down that war cannot be levied without the actual application of violence to external objects. The silence of the reporters on this point may be readily accounted for. In cases of actual rebellion against the government the most active and influential leaders are generally most actively engaged in the war, and as the object can never be to extend punishment to extermination, a sufficient number are found among those who have committed actual hostilities to satisfy the avenging arm of justice. In cases of constructive treason, such as pulling down meeting-houses, where the direct and avowed object is not the destruction of the sovereign power, some act of violence might be generally required to give the crime a sufficient degree of malignity to convert it into treason, to render the guilt of any individual unequivocal.

But Vaughan's case is a case where there was no real applica-

4 Cr. 476.

tion of violence, and where the act was adjudged to be treason. Gentlemen argue that Vaughan was only guilty of adhering to the king's enemies, but they have not the authority of the court for so saying. The judges unquestionably treat the cruising of Vaughan as an overt act of levying war.

The opinions of the best elementary writers concur in declaring, that, where a body of men are assembled for the purpose of making war against the government, and are in a condition to make that war, the assemblage is an act of levying war. These opinions are contradicted by no adjudged case, and are supported by Vaughan's case. This court is not inclined to controvert them.

But although in this respect the opinion of the supreme court has not been misunderstood on the part of the prosecution, that opinion seems not to have been fully adverted to in a very essential point in which it is said to have been misconceived by others.

The opinion, I am informed, has been construed to mean that any assemblage whatever for a treasonable purpose, whether in force or not in force, whether in a condition to use violence, or not in that condition, is a levying of war. It is this construction, which has not, indeed, been expressly advanced at the bar, but which is said to have been adopted elsewhere, that the court deems it necessary to examine.

Independent of authority, trusting only to the dictates of reason, and expounding terms according to their ordinary signification, we should probably all concur in the declaration that war could not be levied without the employment and exhibition of force. War is an appeal from reason to the sword, and he who makes the appeal evidences the fact by the use of the means. His intention to go to war may be proved by words, but the actual going to war is a fact which is to be proved by open deed. The end is to be effected by force; and it would seem, that, in cases where no declaration is to be made, the state of actual war could only be created by the employment of force, or being in a condition to employ it.

4 Cr. 476.

But the term having been adopted by our constitution must be understood in that sense in which it was universally received in this country when the constitution was framed. The sense in which it was received is to be collected from the most approved authorities of that nation from which we have borrowed the term.

Lord Coke says, that levying war against the king was treason at the common law. "A compassing or conspiracy to levy war," he adds, "is no treason, for there must be a levying of war in fact." He proceeds to state cases of constructive levying war, where the direct design is not to overturn the government, but to effect some general object by force. The terms he employs in stating these cases are such as indicate an impression on his mind that actual violence is a necessary ingredient in constituting the fact of levying war. He then proceeds to say, "An actual rebellion, or insurrection, is a levying of war within this act." "If any, with strength and weapons, invasive and defensive, doth hold and defend a castle or fort against the king and his power, this is levying war against the king." These cases are put to illustrate what he denominates "a war in fact." It is not easy to conceive "an actual invasion or insurrection" unconnected with force, nor can "a castle or fort be defended with strength and weapons invasive and defensive," without the employment of actual force. It would seem, then, to have been the opinion of Lord Coke that to levy war there must be an assemblage of men in a condition and with an intention to employ force. He certainly puts no case of a different description.

Lord Hale says, (149,6,) "What shall be said a levying of war is partly a question of fact, for it is not every unlawful or riotous assembly of many persons to do an unlawful act, though de facto they commit the act they intend, that makes a levying of war; for then every riot would be treason," &c.; "but it must be such an assembly as carries with it speciem belli, the appearance of war, as if they ride or march, vexillis explicatis, with colors flying, or if they be formed into companies, or furnished

4 Cr. 477.

with military officers, or if they are armed with military weapons, as swords, guns, bills, halberds, pikes, and are so circumstanced that it may be reasonably concluded they are in a posture of war, which circumstances are so various that it is hard to describe them all particularly."

"Only the general expressions in all the indictments of this nature that I have seen are more guerrino arraiati, arrayed in a warlike manner."

He afterwards adds, "If there be a war levied as is above declared, namely, an assembly arrayed in warlike manner, and so in the posture of war for any treasonable attempt, it is *bellum levatum*, but not *percussum*."

It is obvious that Lord Hale supposed an assemblage of men in force, in a military posture, to be necessary to constitute the fact of levying war. The idea he appears to suggest, that the apparatus of war is necessary, has been very justly combated by an able judge who has written a valuable treatise on the subject of treason; but it is not recollected that his position, that the assembly should be in a posture of war for any treasonable attempt, has ever been denied. Hawkins (c. 17, s. 23) says, "That not only those who rebel against the king and take up arms to dethrone him, but also, in many other cases, those who in a violent and forcible manner withstand his lawful authority, are said to levy war against him; and therefore those that hold a fort or castle against the king's forces, or keep together armed numbers of men against the king's express command, have been adjudged to levy war against him."

The cases put by Hawkins are all cases of actual force and violence. "Those who rebel against the king and take up arms to dethrone him;" in many other cases, "those who in a violent and forcible manner withstand his lawful authority;" "those that hold a fort or castle against his forces, or keep together armed numbers of men against his express command."

These cases are obviously cases of force and violence.

Hawkins next proceeds to describe cases in which war is understood to be levied under the statute, although it was not

directly made against the government. This Lord Hale terms an interpretative or constructive levying of war, and it will be perceived that he puts no case in which actual force is dispensed with. "Those also," he says, "who make an insurrection in order to redress a public grievance, whether it be a real or pretended one, and of their own authority attempt with force to redress it, are said to levy war against the king, although they have no direct design against his person, inasmuch as they insolently invade his prerogative, by attempting to do that by private authority which he by public justice ought to do, which manifestly tends to a downright rebellion. As where great numbers by force attempt to remove certain persons from the king," &c. The cases here put by Hawkins of a constructive levying of war do in terms require force as a constituent part of the description of the offence.

Judge Foster, in his valuable treatise on treason, states the opinion which has been quoted from Lord Hale, and differs from that writer so far as the latter might seem to require swords, drums, colors, &c., what he terms the pomp and pageantry of war, as essential circumstances to constitute the fact of levying war. In the cases of Damaree and Purchase he says, "The want of those circumstances weighed nothing with the court, although the prisoners' counsel insisted much on that matter." But he adds, "The number of the insurgents supplied the want of military weapons; and they were provided with axes, crows, and other tools of the like nature, proper for the mischief they intended to effect. *Furor arma ministrat.*"

It is apparent that Judge Foster here alludes to an assemblage in force, or, as Lord Hale terms it, "in a warlike posture," that is, in a condition to attempt or proceed upon the treason which had been contemplated. The same author afterwards states at large the cases of Damaree and Purchase, from 8th State Trials, and they are cases where the insurgents not only assembled in force, in the posture of war, or in a condition to execute the treasonable design, but they did actually carry it into execution, and did resist the guards who were sent to disperse them.

4 Cr. 478.

Judge Foster states (s. 4) all insurrections to effect certain innovations of a public and general concern by an armed force to be, in construction of law, high treason within the clause of levying war.

The cases put by Foster of constructive levying of war all contain, as a material ingredient, the actual employment of force. After going through this branch of his subject, he proceeds to state the law in a case of actual levying of war, that is, where the war is intended directly against the government.

He says, (s. 9,) "An assembly armed and arrayed in a warlike manner for a treasonable purpose is *bellum levatum* though not *bellum percussum.* Listing and marching are sufficient overt acts without coming to a battle or action. So cruising on the king's subjects under a French commission, France being then at war with us, was held to be adhering to the king's enemies, though no other act of hostility be proved."

"An assembly armed and arrayed in a warlike manner for any treasonable purpose" is certainly in a state of force; in a condition to execute the treason for which they assembled. The words "enlisting and marching," which are overt acts of levying war, do, in the arrangement of the sentence, also imply a state of force, though that state is not expressed in terms; for the succeeding words, which state a particular event as not having happened, prove that event to have been the next circumstance to those which had happened; they are, "without coming to a battle or action." If men be enlisted and march, (that is, if they march prepared for battle, or in a condition for action, for marching is a technical term applied to the movement of a military corps,) it is an overt act of levying war, though they do not come to battle or action. This exposition is rendered the stronger by what seems to be put in the same sentence as a parallel case with respect to adhering to an enemy. It is cruising under a commission from an enemy, without committing any other act of hostility. Cruising is the act of sailing in warlike form, and in a condition to assail those of whom the cruiser is in quest.

4 Cr. 479.

This exposition, which seems to be that intended by Judge Foster, is rendered the more certain by a reference to the case in the State Trials from which the extracts are taken. The words used by the chief justice are, "When men form themselves into a body, and march rank and file with weapons offensive and defensive, this is levying of war with open force, if the design be public." Mr. Phipps, the counsel for the prisoner, afterwards observed, "Intending to levy war is not treason, unless a war be actually levied." To this the chief justice answered, "Is it not actually levying of war, if they actually provide arms and levy men, and in a warlike manner set out and cruise, and come with a design to destroy our ships?" Mr. Phipps still insisted, "It would not be an actual levying of war unless they committed some act of hostility." "Yes, indeed," said the chief justice, "the going on board, and being in a posture to attack the king's ships." Mr. Baron Powis added, "But for you to say that because they did not actually fight it is not a levying of war, is it not plain what they did intend? That they came with that intention, that they came in that posture, that they came armed, and had guns and blunderbusses, and surrounded the ship twice; they came with an armed force, that is a strong evidence of the design."

The point insisted on by counsel in the case of Vaughan, as in this case, was, that war could not be levied without actual fighting. In this the counsel was very properly overruled; but it is apparent that the judges proceeded entirely on the idea that a warlike posture was indispensable to the fact of levying war.

Judge Foster proceeds to give other instances of levying war. "Attacking the king's forces in opposition to his authority, upon a march, or in quarters, is levying war." "Holding a castle or fort against the king or his forces, if actual force be used in order to keep possession, is levying war. But a bare detainer, as suppose by shutting the gates against the king or his forces, without any other force from within, Lord Hale conceiveth will not amount to treason."

4 Cr. 479.

The whole doctrine of Judge Foster on this subject seems to demonstrate a clear opinion that a state of force and violence, a posture of war, must exist, to constitute technically, as well as really, the fact of levying war.

Judge Blackstone seems to concur with his predecessors. Speaking of levying war, he says, "This may be done by taking arms not only to dethrone the king, but under pretence to reform religion, or the laws, or to remove evil counsellors, or other grievances, whether real or pretended. For the law does not, neither can it, permit any private man or set of men to interfere forcibly in matters of such high importance."

He proceeds to give examples of levying war which show that he contemplated actual force as a necessary ingredient in the composition of this crime.

It would seem, then, from the English authorities, that the words "levying war" have not received a technical, different from their natural meaning, so far as respects the character of the assemblage of men which may constitute the fact. It must be a warlike assemblage, carrying the appearance of force, and in a situation to practise hostility.

Several judges of the United States have given opinions at their circuits on this subject, all of which deserve and will receive the particular attention of this court.

In his charge to the grand jury, when John Fries was indicted in consequence of a forcible opposition to the direct tax, Judge Iredell is understood to have said, "I think I am warranted in saying, that, if, in the case of the insurgents who may come under your consideration, the intention was to prevent by force of arms the execution of any act of the congress of the United States altogether, any forcible opposition calculated to carry that intention into effect was a levying of war against the United States, and of course an act of treason." To levy war, then, according to this opinion of Judge Iredell, required the actual exertion of force.

Judge Paterson, in his opinions delivered in two different cases, seems not to differ from Judge Iredell. He does not

4 Cr. 480.

indeed precisely state the employment of force as necessary to constitute a levying of war, but in giving his opinion in cases in which force was actually employed, he considers the crime in one case as dependent on the intention, and in the other case he says, "Combining these facts with this design," (that is, combining actual force with a treasonable design,) "the crime is high treason."

Judge Peters has also indicated the opinion that force was necessary to constitute the crime of levying war.

Judge Chase has been particularly clear and explicit. In an opinion which he appears to have prepared on great consideration he says, "The court are of opinion, if a body of people conspire and meditate an insurrection to resist or oppose the execution of a statute of the United States by force, that they are only guilty of a high misdemeanor; but if they proceed to carry such intention into execution by force, that they are guilty of the treason of levying war; and the quantum of the force employed neither increases nor diminishes the crime; whether by one hundred or one thousand persons is wholly immaterial.

"The court are of opinion that a combination or conspiracy to levy war against the United States is not treason, unless combined with an attempt to carry such combination or conspiracy into execution; some actual force or violence must be used in pursuance of such design to levy war; but that it is altogether immaterial whether the force used be sufficient to effectuate the object. Any force connected with the intention will constitute the crime of levying of war."

In various parts of the opinion delivered by Judge Chase, in the case of Fries, the same sentiments are to be found. It is to be observed that these judges are not content that troops should be assembled in a condition to employ force; according to them some degree of force must have been actually employed.

The judges of the United States, then, so far as their opinions have been quoted, seem to have required still more to constitute the fact of levying war than has been required by the Eng-

4 Cr. 481.

lish books. Our judges seem to have required the actual exercise of force, the actual employment of some degree of violence. This, however, may be, and probably is, because in the cases in which their opinions were given the design not having been to overturn the government, but to resist the execution of a law, such an assemblage would be sufficient for the purpose, as to require the actual employment of force to render the object unequivocal.

But it is said all these authorities have been overruled by the decision of the supreme court in the case of the United States against Swartwout and Bollman.

If the supreme court have, indeed, extended the doctrine of treason further than it has heretofore been carried by the judges of England or of this country, their decision would be submitted to. At least this court could go no further than to endeavor again to bring the point directly before them. It would, however, be expected that an opinion which is to overrule all former precedents, and to establish a principle never before recognized, should be expressed in plain and explicit terms. A mere implication ought not to prostrate a principle which seems to have been so well established. Had the intention been entertained to make so material a change in this respect, the court ought to have expressly declared that any assemblage of men whatever, who had formed a treasonable design, whether in force or not, whether in a condition to attempt the design or not, whether attended with warlike appearances or not, constitutes the fact of levying war. Yet no declaration to this amount is made. Not an expression of the kind is to be found in the opinion of the supreme court. The foundation on which this argument rests is the omission of the court to state that the assemblage which constitutes the fact of levying war ought to be in force, and some passages which show that the question respecting the nature of the assemblage was not in the mind of the court when the opinion was drawn, which passages are mingled with others which at least show that there was no intention to depart from the course of the precedents in cases of treason by levying war.

4 Cr. 482.

Every opinion, to be correctly understood, ought to be considered with a view to the case in which it was delivered. In the case of the United States against Bollman and Swartwout, there was no evidence that even two men had ever met for the purpose of executing the plan in which those persons were charged with having participated. It was therefore sufficient for the court to say that unless men were assembled war could not be levied. That case was decided by this declaration. The court might, indeed, have defined the species of assemblage which would amount to levying of war; but as this opinion was not a treatise on treason, but a decision of a particular case, expressions of doubtful import should be construed in reference to the case itself; and the mere omission to state that a particular circumstance was necessary to the consummation of the crime ought not to be construed into a declaration that the circumstance was unimportant. General expressions ought not to be considered as overruling settled principles without a direct declaration to that effect. After these preliminary observations the court will proceed to examine the opinion which has occasioned them.

The first expression in it bearing on the present question is, "To constitute that specific crime for which the prisoners now before the court have been committed, war must be actually levied against the United States. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offences. The first must be brought into operation by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed."

Although it is not expressly stated that the assemblage of men, for the purpose of carrying into operation the treasonable intent which will amount to levying war, must be an assemblage in force, yet it is fairly to be inferred from the context, and nothing like dispensing with force appears in this paragraph. The expressions are, "To constitute the crime, war must be act-

4 Cr. 482.

ually levied." A conspiracy to levy war is spoken of as "a conspiracy to subvert by force the government of our country." Speaking in general terms of an assemblage of men for this or for any other purpose, a person would naturally be understood as speaking of an assemblage in some degree adapted to the purpose. An assemblage to subvert by force the government of our country, and amounting to a levying of war, should be an assemblage in force.

In a subsequent paragraph the court says, "It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled in order to effect by force a treasonable purpose, all those who perform any part, however minute, &c., and who are actually leagued in the general conspiracy, are traitors. But there must be an actual assembling of men for the treasonable purpose, to constitute a levying of war."

The observations made on the preceding paragraph apply to this. "A body of men actually assembled, in order to effect by force a treasonable purpose," must be a body assembled with such appearance of force as would warrant the opinion that they were assembled for the particular purpose; an assemblage to constitute an actual levying of war should be an assemblage with such appearance of force as would justify the opinion that they met for the purpose.

This explanation, which is believed to be the natural, certainly not a strained explanation of the words, derives some additional aid from the terms in which the paragraph last quoted commences: "It is not the intention of the court to say that no individual can be guilty of treason who has not appeared in arms against his country." These words seem to obviate an inference which might otherwise have been drawn from the preceding paragraph. They indicate that in the mind of the court the assemblage stated in that paragraph was an assemblage in arms; that the individuals who composed it had appeared in arms against their country; that is, in other words, that the assemblage was a military, a warlike assemblage.

4 Cr. 483.

The succeeding paragraph in the opinion relates to a conspiracy, and serves to show that force and violence were in the mind of the court, and that there was no idea of extending the crime of treason by construction beyond the constitutional definition which had been given of it.

Returning to the case actually before the court, it is said, "A design to overturn the government of the United States in New Orleans by force would have been unquestionably a design which if carried into execution would have been treason, and the assemblage of a body of men for the purpose of carrying it into execution would amount to levying of war against the United States."

Now what could reasonably be said to be an assemblage of a body of men for the purpose of overturning the government of the United States in New Orleans by force? Certainly an assemblage in force; an assemblage prepared and intending to act with force; a military assemblage.

The decisions theretofore made by the judges of the United States are then declared to be in conformity with the principles laid down by the supreme court. Is this declaration compatible with the idea of departing from those opinions on a point within the contemplation of the court? The opinions of Judge Paterson and Judge Iredell are said to "imply an actual assembling of men, though they rather designed to remark on the purpose to which the force was to be applied than on the nature of the force itself." This observation certainly indicates that the necessity of an assemblage of men was the particular point the court meant to establish, and that the idea of force was never separated from this assemblage.

The opinion of Judge Chase is next quoted with approbation. This opinion in terms requires the employment of force.

After stating the verbal communications said to have been made by Mr. Swartwout to General Wilkinson, the court says, "If these words import that the government of New Orleans was to be revolutionized by force, although merely as a step to or a mean of executing some greater projects, the design was

4 Cr. 483.

unquestionably treasonable, and any assemblage of men for that purpose would amount to a levying of war."

The words "any assemblage of men," if construed to affirm that any two or three of the conspirators who might be found together, after this plan had been formed, would be the act of levying war, would certainly be misconstrued. The sense of the expressions, "any assemblage of men," is restricted by the words "for that purpose." Now could it be in the contemplation of the court that a body of men would assemble, for the purpose of revolutionizing New Orleans by force, who should not themselves be in force?

After noticing some difference of opinion among the judges respecting the import of the words said to have been used by Mr. Swartwout, the court proceeds to observe: "But whether this treasonable intention be really imputable to the plan or not, it is admitted that it must have been carried into execution by an open assemblage for that purpose, previous to the arrest of the prisoner, in order to consummate the crime as to him."

Could the court have conceived "an open assemblage" "for the purpose of overturning the government of New Orleans by force" "to be only equivalent to a secret, furtive assemblage without the appearance of force?"

After quoting the words of Mr. Swartwout from the affidavit, in which it was stated that Mr. Burr was levying an army of seven thousand men, and observing that the treason to be inferred from these words would depend on the intention with which it was levied, and on the progress which had been made in levying it, the court say, "The question, then, is, whether this evidence proves Colonel Burr to have advanced so far in levying an army as actually to have assembled them."

Actually to assemble an army of seven thousand men is unquestionably to place those who are so assembled in a state of open force.

But as the mode of expression used in this passage might be misconstrued, so far as to countenance the opinion that it would be necessary to assemble the whole army in order to

4 Cr. 484.

constitute the fact of levying war, the court proceeds to say, "It is argued, that, since it cannot be necessary that the whole seven thousand men should have assembled, their commencing their march by detachments to the place of rendezvous must be sufficient to constitute the crime.

"This position is correct with some qualification. It cannot be necessary that the whole army should assemble, and that the various parts which are to compose it should have combined. But it is necessary there should be an actual assemblage; and therefore the evidence should make the fact unequivocal.

"The travelling of individuals to the place of rendezvous would, perhaps, not be sufficient. This would be an equivocal act, and has no warlike appearance. The meeting of particular bodies of men, and their marching from places of partial to a place of general rendezvous would be such an assemblage."

The position here stated by the counsel for the prosecution is, that the army "commencing its march by detachments to the place of rendezvous (that is, of the army) must be sufficient to constitute the crime."

This position is not admitted by the court to be universally correct. It is said to be "correct with some qualification." What is that qualification?

"The travelling of individuals to the place of rendezvous" (and by this term is not to be understood one individual by himself, but several individuals, either separately or together, but not in military form) "would, perhaps, not be sufficient." Why not sufficient? Because, says the court, "this would be an equivocal act, and has no warlike appearance." The act, then, should be unequivocal and should have a warlike appearance. It must exhibit, in the words of Sir Matthew Hale, *speciem belli*, the appearance of war.

This construction is rendered in some measure necessary, when we observe that the court is qualifying the position, that the army "commencing their march by detachments to the place of rendezvous must be sufficient to constitute the crime." In qualifying this position they say, "The travelling of individuals

4 Cr. 485.

would, perhaps, not be sufficient." Now a solitary individual travelling to any point, with any intent, could not, without a total disregard of language, be termed a marching detachment. The court, therefore, must have contemplated several individuals travelling together; and the words, being used in reference to the position they were intended to qualify, would seem to indicate the distinction between the appearances attending the usual movement of a company of men for civil purposes, and that military movement which might, in correct language, be denominated "marching by detachments."

The court then proceeded to say, "The meeting of particular bodies of men, and their marching from places of a partial to a place of general rendezvous, would be such an assemblage."

It is obvious, from the context, that the court must have intended to state a case which would in itself be unequivocal, because it would have a warlike appearance. The case stated is that of distinct bodies of men assembling at different places, and marching from these places of partial to a place of general rendezvous. When this has been done, an assemblage is produced which would in itself be unequivocal. But when is it done? What is the assemblage here described? The assemblage formed of the different bodies of partial at a general place of rendezvous. In describing the mode of coming to this assemblage the civil term "travelling" is dropped, and the military term "marching" is employed. If this was intended as a definition of an assemblage which would amount to levying war, the definition requires an assemblage at a general place of rendezvous, composed of bodies of men who had previously assembled at places of partial rendezvous. But this is not intended as a definition; for, clearly, if there should be no places of partial rendezvous, if troops should embody in the first instance, in great force, for the purpose of subverting the government by violence, the act would be unequivocal, it would have a warlike appearance, and it would, according to the opinion of the supreme court properly construed, and according to the English authorities, amount to levying war. But this, though not a definition,

4 Cr. 486.

is put as an example; and surely it may be safely taken as an example. If different bodies of men, in pursuance of a treasonable design plainly proved, should assemble in warlike appearance at places of partial rendezvous, and should march from those places to a place of general rendezvous, it is difficult to conceive how such a transaction could take place without exhibiting the appearance of war, without an obvious display of force. At any rate, a court, in stating generally such a military assemblage as would amount to levying war, and having a case before them in which there was no assemblage whatever, cannot reasonably be understood, in putting such an example, to dispense with those appearances of war which seem to be required by the general current of authorities. Certainly they ought not to be so understood, when they say, in express terms, that "It is more safe, as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition should receive such punishment as the legislature in its wisdow may provide."

After this analysis of the opinion of the supreme court, it will be observed that the direct question, whether an assemblage of men which might be construed to amount to a levying of war must appear in force or in military form, was not in argument or in fact before the court, and does not appear to have been in terms decided. The opinion seems to have been drawn without particularly adverting to this question, and therefore, upon a transient view of particular expressions, might inspire the idea that a display of force, that appearances of war, were not necessary ingredients to constitute the fact of levying war. But upon a more intent and more accurate investigation of this opinion, although the terms "force" and "violence" are not employed as descriptive of the assemblage, such requisites are declared to be indispensable, as can scarcely exist without the appearance of war and the existence of real force. It is said that war must be levied in fact; that the object must be one which is to be effected by force; that the assemblage must be

4 Cr. 486.

such as to prove that this is its object; that it must not be an equivocal act, without a warlike appearance; that it must be an open assemblage for the purpose of force. In the course of this opinion decisions are quoted and approved which require the employment of force to constitute the crime. It seems extremely difficult, if not impossible, to reconcile these various declarations with the idea that the supreme court considered a secret, unarmed meeting, although that meeting be of conspirators, and although it met with a treasonable intent, as an actual levying of war. Without saying that the assemblage must be in force or in warlike form, they express themselves so as to show that this idea was never discarded, and they use terms which cannot be otherwise satisfied.

The opinion of a single judge certainly weighs as nothing, if opposed to that of the supreme court; but if he was one of the judges who assisted in framing that opinion, if while the impression under which it was framed was yet fresh upon his mind, he delivered an opinion on the same testimony, not contradictory to that which had been given by all the judges together, but showing the sense in which he understood terms that might be differently expounded, it may fairly be said to be in some measure explanatory of the opinion itself.

To the judge before whom the charge against the prisoner at the bar was first brought the same testimony was offered with that which had been exhibited before the supreme court, and he was required to give an opinion in almost the same case. Upon this occasion he said, "War can only be levied by the employment of actual force. Troops must be embodied, men must be assembled, in order to levy war." Again, he observed, "The fact to be proved in this case is an act of public notoriety. It must exist in the view of the world, or it cannot exist at all. The assembling of forces to levy war is a visible transaction, and numbers must witness it."

It is not easy to doubt what kind of assemblage was in the mind of the judge who used these expressions, and it is to be recollected that he had just returned from the supreme court,

4 Cr. 487.

and was speaking on the very facts on which the opinion of that court was delivered.

The same judge, in his charge to the grand jury who found this bill, observed, "To constitute the fact of levying war, it is not necessary that hostilities shall have actually commenced by engaging the military force of the United States, or that measures of violence against the government shall have been carried into execution. But levying war is a fact in the constitution of which force is an indispensable ingredient. Any combination to subvert by force the government of the United States, violently to dismember the union, to compel a change in the administration, to coerce the repeal or adoption of a general law, is a conspiracy to levy war; and if the conspiracy be carried into effect by the actual employment of force, by the embodying and assembling of men for the purpose of executing the treasonable design which was previously conceived, it amounts to levying of war. It has been held that arms are not essential to levying war, provided the force assembled be sufficient to attain, or perhaps to justify attempting, the object without them." This paragraph is immediately followed by a reference to the opinion of the supreme court.

It requires no commentary upon these words to show, that, in the opinion of the judge who uttered them, an assemblage of men which should constitute the fact of levying war must be an assemblage in force, and that he so understood the opinion of the supreme court. If in that opinion there may be found in some passages a want of precision, and indefiniteness of expression, which has occasioned it to be differently understood by different persons, that may well be accounted for, when it is recollected that in the particular case there was no assemblage whatever. In expounding that opinion the whole should be taken together, and in reference to the particular case in which it was delivered. It is, however, not improbable that the misunderstanding has arisen from this circumstance. The court, unquestionably, did not consider arms as an indispensable requisite to levying war; an assemblage adapted to the object might

4 Cr. 487.

be in a condition to effect or to attempt it without them. Nor did the court consider the actual application of the force to the object, at all times, an indispensable requisite; for an assemblage might be in a condition to apply force, might be in a state adapted to real war, without having made the actual application of that force. From these positions, which are to be found in the opinion, it may have been inferred, it is thought too hastily, that the nature of the assemblage was unimportant, and that war might be considered as actually levied by any meeting of men, if a criminal intention can be imputed to them by testimony of any kind whatever.

It has been thought proper to discuss this question at large, and to review the opinion of the supreme court, although this court would be more disposed to leave the question of fact, whether an overt act of levying war was committed on Blennerhassett's island, to the jury, under this explanation of the law, and to instruct them, that, unless the assemblage on Blennerhassett's island was an assemblage in force, was a military assemblage in a condition to make war, it was not a levying of war, and that they could not construe it into an act of war, than to arrest the further testimony which might be offered to connect the prisoner with that assemblage, or to prove the intention of those who assembled together at that place. This point, however, is not to be understood as decided. It will, perhaps, constitute an essential inquiry in another case.

Before leaving the opinion of the supreme court entirely, on the question of the nature of the assemblage which will constitute an act of levying war, this court cannot forbear to ask, Why is an assemblage absolutely required? Is it not to judge in some measure of the end by the proportion which the means bear to the end? Why is it that a single armed individual, entering a boat and sailing down the Ohio, for the avowed purpose of attacking New Orleans, could not be said to levy war? Is it not that he is apparently not in a condition to levy war? If this be so, ought not the assemblage to furnish some evidence of its intention and capacity to levy war before it can amount

4 Cr. 488.

to levying war? And ought not the supreme court, when speaking of an assemblage for the purpose of effecting a treasonable object by force, be understood to indicate an assemblage exhibiting the appearance of force?

The definition of the attorney for the United States deserves notice in this respect. It is, "When there is an assemblage of men convened for the purpose of effecting by force a treasonable object, which force is meant to be employed before the assemblage disperses, this is treason."

To read this definition without adverting to the argument, we should infer that the assemblage was itself to effect by force the treasonable object, not to join itself to some other bodies of men, and then to effect the object by their combined force. Under this construction it would be expected the appearance of the assemblage would bear some proportion to the object, and would indicate the intention; at any rate, that it would be an assemblage in force. This construction is most certainly not that which was intended, but it serves to show that general phrases must always be understood in reference to the subject-matter, and to the general principles of law.

On that division of the subject which respects the merits of the case connected with the pleadings, two points are also made.

1st. That this indictment, having charged the prisoner with levying war on Blennerhassett's island and containing no other overt act, cannot be supported by proof that war was levied at that place by other persons, in the absence of the prisoner, even admitting those persons to be connected with him in one common treasonable conspiracy.

2d. That, admitting such an indictment could be supported by such evidence, the previous conviction of some person who committed the act which is said to amount to levying war is indispensable to the conviction of a person who advised or procured that act.

As to the first point, the indictment contains two counts, one of which charges that the prisoner, with a number of persons

unknown, levied war on Blennerhassett's island, in the county of Wood, in the district of Virginia; and the other adds the circumstance of their proceeding from that island down the river, for the purpose of seizing New Orleans by force.

In point of fact, the prisoner was not on Blennerhassett's island, nor in the county of Wood, nor in the district of Virginia.

In considering this point, the court is led first to inquire whether an indictment for levying war must specify an overt act, or would be sufficient if it merely charged the prisoner in general terms with having levied war, omitting the expression of place or circumstance.

The place in which a crime was committed is essential to an indictment, were it only to show the jurisdiction of the court. It is also essential for the purpose of enabling the prisoner to make his defence. That at common law an indictment would have been defective, which did not mention the place in which the crime was committed, can scarcely be doubted. For this, it is sufficient to refer to Hawkins, b. 2, c. 25, s. 84, and c. 23, s. 91. This necessity is rendered the stronger by the constitutional provision that the offender "shall be tried in the state and district wherein the crime shall have been committed," and by the act of congress which requires that twelve petty jurors, at least, shall be summoned from the county where the offence was committed.

A description of the particular manner in which the war was levied seems also essential, to enable the accused to make his defence. The law does not expect a man to be prepared to defend every act of his life which may be suddenly and without notice alleged against him. In common justice, the particular fact with which he is charged ought to be stated, and stated in such a manner as to afford a reasonable certainty of the nature of the accusation, and the circumstances which will be adduced against him. The general doctrine on the subject of indictments is full to this point. Foster, (p. 149,) speaking of the treason of compassing the king's death, says, "From what

has been said it followeth that in every indictment for this species of treason, and, indeed, for levying war and adhering to the king's enemies, an overt act must be alleged and proved. For the overt act is the charge to which the prisoner must apply his defence."

In page 220 Foster repeats this declaration. It is also laid down in Hawkins, b. 8, c. 17, s. 29 ; 1 Hale, 121 ; 1 East, 116, and by the other authorities cited, especially Vaughan's case. In corroboration of this opinion, it may be observed, that treason can only be established by the proof of overt acts, and that, by the common law, as well as by the statute of 7th of William III., those overt acts only which are charged in the indictment can be given in evidence, unless, perhaps, as corroborative testimony after the overt acts are proved. That clause in the constitution, too, which says that in all criminal prosecutions the accused shall enjoy the right "to be informed of the nature and cause of the accusation," is considered as having a direct bearing on this point. It secures to him such information as will enable him to prepare for his defence.

It seems, then, to be perfectly clear that it would not be sufficient for an indictment to allege generally that the accused had levied war against the United States. The charge must be more particularly specified, by laying what is termed an overt act of levying war. The law relative to an appeal, as cited from Stamford, is strongly corroborative of this opinion.

If it be necessary to specify the charge in the indictment, it would seem to follow, irresistibly, that the charge must be proved as laid.

All the authorities which require an overt act require also that this overt act should be proved. The decision in Vaughan's case is particularly in point. Might it be otherwise, the charge of an overt act would be a mischief instead of an advantage to the accused. It would lead him from the true cause and nature of the accusation, instead of informing him respecting it.

But it is contended on the part of the prosecution, that, al-

though the accused had never been with the party which assembled at Blennerhassett's island, and was at the time at a great distance, and in a different state, he was yet legally present, and therefore may properly be charged in the indictment as being present in fact.

It is therefore necessary to inquire whether in this case the doctrine of constructive presence can apply.

It is conceived by the court to be possible that a person may be concerned in a treasonable conspiracy, and yet be legally, as well as actually, absent, while some one act of the treason is perpetrated. If a rebellion should be so extensive as to spread through every state in the union, it will scarcely be contended that every individual concerned in it is legally present at every overt act committed in the course of that rebellion. It would be a very violent presumption indeed, too violent to be made without clear authority, to presume that even the chief of the rebel army, with the chief at its head, should be prosecuting war at one extremity of our territory, say in New Hampshire; if this chief should be there captured and sent to the other extremity for the purpose of trial; if his indictment, instead of alleging an overt act, which was true in point of fact, should allege that he had assembled some small party, which in truth he had not seen, and had levied war by engaging in a skirmish in Georgia, at a time when in reality he was fighting a battle in New Hamsphire; if such evidence would support such an indictment, by the fiction that he was legally present, though really absent, all would ask, To what purpose are those provisions in the constitution which direct the place of trial, and ordain that the accused shall be informed of the nature and cause of the accusation?

But that a man may be legally absent who has counselled or procured a treasonable act is proved by all those books which treat upon the subject, and which concur in declaring that such a person is a principal traitor, not because he was legally present, but because in treason all are principals. Yet the indictment upon general principles would charge him according to

4 Cr. 491.

the truth of the case. Lord Coke says, "If many conspire to levy war, and some of them do levy the same according to the conspiracy, this is high treason in all." Why? Because all were legally present when the war was levied? No. "For in treason," continues Lord Coke, "all be principals, and war is levied." In this case the indictment, reasoning from analogy, would not charge that the absent conspirators were present, but would state the truth of the case. If the conspirator had done nothing which amounted to levying of war, and if by our constitution the doctrine that an accessory becomes a principal be not adopted, in consequence of which the conspirator could not be condemned under an indictment stating the truth of the case, it would be going very far to say that this defect, if it be termed one, may be cured by an indictment stating the case untruly.

This doctrine of Lord Coke has been adopted by all subsequent writers; and it is generally laid down in the English books that whatever will make a man an accessory in felony will make him a principal in treason; but it is nowhere suggested that he is by construction to be considered as present when in point of fact he was absent.

Foster has been particularly quoted, and certainly he is precisely in point. "It is well known," says Foster, "that in the language of the law there are no accessories in high treason; all are principals. Every instance of incitement, aid, or protection, which in the case of felony will render a man an accessory before or after the fact, in the case of high treason, whether it be treason at common law or by statute, will make him a principal in treason." The cases of incitement and aid are cases put as examples of a man's becoming a principal in treason, not because he was legally present, but by force of that maxim in the common law, that whatever will render a man an accessory at common law will render him a principal in treason. In other passages the words "command" or "procure" are used to indicate the same state of things, that is, a treasonable assemblage produced by a man who is not himself in that assemblage.

4 Cr. 491.

In point of law, then, the man, who incites, aids, or procures a treasonable act, is not, merely in consequence of that incitement, aid, or procurement, legally present when that act is committed.

If it does not result from the nature of the crime that all who are concerned in it are legally present at every overt act, then each case depends upon its own circumstances ; and to judge how far the circumstances of any case can make him legally present who is in fact absent, the doctrine of constructive presence must be examined.

Hale (in his 1st vol. p. 615) says, "Regularly no man can be a principal in felony unless he be present." In the same page he says, "An accessory before is he, that, being absent at the time of the felony committed, doth yet procure, counsel, or command another to commit a felony." The books are full of passages which state this to be the law. Foster, in showing what acts of concurrence will make a man a principal, says, "He must be present at the perpetration, otherwise he can be no more than an accessory before the fact."

These strong distinctions would be idle, at any rate they would be inapplicable to treason, if they were to be entirely lost in the doctrine of constructive presence.

Foster adds, (page 349,) "When the law requireth the presence of the accomplice at the perpetration of the fact in order to render him a principal, it doth not require a strict, actual, immediate presence, such a presence as would make him an eye or ear witness of what passeth." The terms used by Foster are such as would be employed by a man intending to show the necessity that the absent person should be near at hand, although, from the nature of the thing, no precise distance could be marked out. An inspection of the cases from which Foster drew his general principle will serve to illustrate it. (See Hale, p. 439.) In all these cases put by Hale, the whole party set out together to commit the very fact charged in the indictment, or to commit some other unlawful act, in which they are all to be personally concerned at the same time and place, and are, at the very time when the criminal fact is committed, near enough

to give actual personal aid and assistance to the man who perpetrated it. Hale, (in page 449,) giving the reason for the decision in the case of the Lord Dacres, says, "They all came with an intent to steal the deer, and consequently the law supposes that they came all with the intent to oppose all that should hinder them in that design." The original case says this was their resolution. This opposition would be a personal opposition. This case, even as stated by Hale, would clearly not comprehend any man who entered into the combination, but who, instead of going to the park where the murder was committed, should not set out with the others, should go to a different park, or should even lose his way. (See Hale, 534.)

In both the cases here stated the persons actually set out together, and were near enough to assist in the commission of the fact. That in the case of Pudsy the felony was, as stated by Hale, a different felony from that originally intended, is unimportant in regard to the particular principle now under consideration, so far as respected distance ; as respected capacity to assist in case of resistance, it is the same as if the robbery had been that which was originally designed. The case in the original report shows that the felony committed was in fact in pursuance of that originally designed. Foster (p. 350) plainly supposes the same particular design, not a general design composed of many particular, distinct facts. He supposes them to be co-operating with respect to that particular design. This may be illustrated by a case which is perhaps common. Suppose a band of robbers confederated for the general purpose of robbing. They set out together, or in parties, to rob a particular individual, and each performs the part assigned to him. Some ride up to the individual and demand his purse, others watch out of sight to intercept those who might be coming to assist the man on whom the robbery is to be committed. If murder or robbery actually take place, all are principals, and all, in construction of law, are present. But suppose they set out at the same time, or at different times, by different roads, to attack and rob different individuals or different companies ; to commit distinct acts

of robbery. It has never been contended that those who committed one act of robbery, or who failed altogether, were constructively present at the act of those who were associated with them in the common object of robbery, who were to share the plunder, but who did not assist at the particular fact. They do, indeed, belong to the general party, but they are not of the particular party which committed this fact. Foster concludes this subject by observing, that, "in order to render a person an accomplice and a principal in felony, he must be aiding and abetting at the fact, or ready to afford assistance if necessary." That is, at the particular fact which is charged, he must be ready to render assistance to those who are committing that particular fact; he must, as is stated by Hawkins, be ready to give immediate and direct assistance.

All the cases to be found in the books go to the same point. Let them be applied to that under consideration.

The whole treason laid in this indictment is the levying of war in Blennerhassett's island, and the whole question to which the inquiry of the court is now directed is, whether the prisoner was legally present at that fact.

I say this is the whole question, because the prisoner can only be convicted on the overt act laid in the indictment. With respect to this prosecution, it is as if no other overt act existed. If other overt acts can be inquired into, it is for the sole purpose of proving the particular fact charged; it is as evidence of the crime consisting of this particular fact, not as establishing the general crime by a distinct fact.

The counsel for the prosecution have charged those engaged in the defence with considering the overt act as the treason, whereas it ought to be considered solely as the evidence of the treason; but the counsel for the prosecution seem themselves not to have sufficiently adverted to this clear principle, that, though the overt act may not be itself the treason, it is the sole act of that treason which can produce conviction. It is the sole point in issue between the parties. And the only division of that point, if the expression be allowed, which the court

4 Cr. 493.

is now examining, is the constructive presence of the prisoner at the fact charged.

To return, then, to the application of the cases.

Had the prisoner set out with the party from Beaver for Blennerhassett's island, or, perhaps, had he set out for that place, though not from Beaver, and had arrived in the island, he would have been present at the fact; had he not arrived in the island but had taken a position near enough to co-operate with those on the island, to assist them in any act of hostility, or to aid them if attacked, the question whether he was constructively present would be a question compounded of law and fact, which would be decided by the jury, with the aid of the court, so far as respected the law. In this case the accused would have been of the particular party assembled on the island, and would have been associated with them in the particular act of levying war said to have been committed on the island.

But if he was not with the party at any time before they reached the island; if he did not join them there, or intend to join them there; if his personal co-operation in the general plan was to be afforded elsewhere, at a great distance, in a different state; if the overt acts of treason to be performed by him were to be distinct overt acts; then he was not of the particular party assembled at Blennerhassett's island, and was not constructively present, aiding and assisting in the particular act which was there committed.

The testimony on this point, so far as it has been delivered, is not equivocal. There is not only no evidence that the accused was of the particular party which assembled on Blennerhassett's island, but the whole evidence shows he was not of that party.

In felony, then, admitting the crime to have been completed on the island, and to have been advised, procured, or commanded by the accused, he would have been incontestably an accessory, and not a principal.

But in treason, it is said, the law is otherwise, because the theatre of action is more extensive.

4 Cr. 494.

This reasoning applies in England as strongly as in the United States. While in 1715 and 1745 the family of Stuart sought to regain the crown they had forfeited, the struggle was for the whole kingdom; yet no man was ever considered as legally present at one place, when actually at another; or as aiding in one transaction, while actually employed in another.

With the perfect knowledge that the whole nation may be the theatre of action, the English books unite in declaring that he who counsels, procures, or aids treason is guilty accessorially, and solely in virtue of the common-law principle that what will make a man an accessory in felony makes him a principal in treason. So far from considering a man as constructively present at every overt act of the general treason in which he may have been concerned, the whole doctrine of the books limits the proof against him to those particular overt acts of levying war with which he is charged.

What would be the effect of a different doctrine? Clearly that which has been stated. If a person levying war in Kentucky may be said to be constructively present and assembled with a party carrying on war in Virginia, at a great distance from him, then he is present at every overt act performed anywhere; he may be tried in any state on the continent where any overt act has been committed; he may be proved to be guilty of an overt act laid in the indictment in which he had no personal participation, by proving that he advised it, or that he committed other acts.

This is perhaps too extravagant to be in terms maintained. Certainly it cannot be supported by the doctrines of the English law.

The opinion of Judge Paterson in Mitchell's case has been cited on this point. (2 Dall. 348.)

The indictment is not specially stated; but from the case as reported, it must have been either general, for levying war in the county of Alleghany, and the overt act laid must have been the assemblage of men and levying of war in that county; or it must have given a particular detail of the treasonable transac-

4 Cr. 494.

tions in that county. The first supposition is the most probable; but let the indictment be in the one form or the other, and the result is the same. The facts of the case are, that a large body of men, of whom Mitchell was one, assembled at Braddock's field, in the county of Alleghany, for the purpose of committing acts of violence at Pittsburgh; that there was also an assemblage at a different time at Couches fort, at which the prisoner also attended. The general and avowed object of that meeting was to concert measures for resisting the execution of a public law. At Couches fort the resolution was taken to attack the house of the inspector, and the body there assembled marched to that house and attacked it. It was proved, by the competent number of witnesses, that he was at Couches fort armed; that he offered to reconnoitre the house to be attacked; that he marched with the insurgents towards the house; that he was with them after the action, attending the body of one of his comrades who was killed in it; one witness swore positively that he was present at the burning of the house, and a second witness said that "it ran in his head that he had seen him there." That a doubt should exist in such a case as this is strong evidence of the necessity that the overt act should be unequivocally proved by two witnesses.

But what was the opinion of the judge in this case? Couches fort and Neville's house being in the same county; the assemblage having been at Couches fort, and the resolution to attack the house having been there taken; the body having, for the avowed purpose, moved, in execution of that resolution, towards the house to be attacked, he inclined to think that the act of marching was in itself levying war. If it was, then the overt act laid in the indictment was consummated by the assemblage at Couches and the marching from thence, and Mitchell was proved to be guilty by more than two positive witnesses. But without deciding this to be the law, he proceeded to consider the meeting at Couches, the immediate marching to Neville's house, and the attack and burning of the house, as one transaction. Mitchell was proved by more than two positive witnesses

4 Cr. 495.

to have been in that transaction, to have taken an active part in it, and the judge declared it to be unnecessary that all should have seen him at the same time and place.

But suppose not a single witness had proved Mitchell to have been at Couches, or on the march, or at Neville's. Suppose he had been at the time notoriously absent in a different state. Can it be believed by any person, who observes the caution with which Judge Paterson required the constitutional proof of two witnesses to the same overt act, that he would have said Mitchell was constructively present, and might, on that straining of a legal fiction, be found guilty of treason? Had he delivered such an opinion, what would have been the language of this country respecting it? Had he given this opinion, it would have required all the correctness of his life to strike his name from that bloody list in which the name of Jeffreys is enrolled.

But to estimate the opinion in Mitchell's case, let its circumstances be transferred to Burr's case. Suppose the body of men assembled in Blennerhassett's island had previously met at some other place in the same county, and that Burr had been proved to be with them by four witnesses; that the resolution to march to Blennerhassett's island for a treasonable purpose had been there taken; that he had been seen on the march with them; that one witness had seen him on the island; that another thought he had seen him there; that he had been seen with the party directly after leaving the island; that this indictment had charged the levying of war in Wood county generally; the cases would then have been perfectly parallel, and the decisions would have been the same.

In conformity with principle and with authority, then, the prisoner at the bar was neither legally nor actually present at Blennerhassett's island; and the court is strongly inclined to the opinion, that, without proving an actual or legal presence by two witnesses, the overt act laid in this indictment cannot be proved.

But this opinion is controverted on two grounds.

The first is, that the indictment does not charge the prisoner to have been present.

The second, that, although he was absent, yet, if he caused the assemblage, he may be indicted as being present, and convicted on evidence that he caused the treasonable act.

The first position is to be decided by the indictment itself. The court understands the allegation differently from the attorney for the United States. The court understands it to be directly charged that the prisoner did assemble with the multitude, and did march with them. Nothing will more clearly test this construction than putting the case into a shape which it may possibly take. Suppose the law to be that the indictment would be defective unless it alleged the presence of the person indicted at the act of treason. If upon a special verdict facts should be found which amounted to a levying of war by the accused, and his counsel should insist that he could not be condemned, because the indictment was defective in not charging that he was himself one of the assemblage which constituted the treason, or because it alleged the procurement defectively, would the attorney admit this construction of his indictment to be correct? I am persuaded that he would not, and that he ought not to make such a concession. If, after a verdict, the indictment ought to be construed to allege that the prisoner was one of the assemblage at Blennerhassett's island, it ought to be so construed now. But this is unimportant; for if the indictment alleges that the prisoner procured the assemblage, that procurement becomes part of the overt act, and must be proved, as will be shown hereafter.

The second position is founded on 1 Hale, 214, 288, and 1 East, 127.

While I declare that this doctrine contradicts every idea I had ever entertained on the subject of indictments, since it admits that one case may be stated, and a very different case may be proved, I will acknowledge that it is countenanced by the authorities adduced in its support. To counsel or advise a treasonable assemblage, and to be one of that assemblage, are certainly distinct acts, and therefore ought not to be charged as the same act. The great objection to this mode of proceeding is, that

the proof essentially varies from the charge, in the character and essence of the offence, and in the testimony by which the accused is to defend himself. These dicta of Lord Hale, therefore, taken in the extent in which they are understood by the counsel for the United States, seem to be repugnant to the declarations we find everywhere, that an overt act must be laid, and must be proved. No case is cited by Hale in support of them, and I am strongly inclined to the opinion, that, had the public received his corrected, instead of his original manuscript, they would, if not expunged, have been restrained in their application to cases of a particular description. Laid down generally, and applied to all cases of treason, they are repugnant to the principles for which Hale contends, for which all the elementary writers contend, and from which courts have in no case, either directly reported, or referred to in the books, ever departed. These principles are, that the indictment must give notice of the offence, that the accused is only bound to answer the particular charge which the indictment contains, and that the overt act laid is that particular charge. Under such circumstances, it is only doing justice to Hale to examine his dicta, and if they will admit of being understood in a limited sense, not repugnant to his own doctrines, nor to the general principles of law, to understand them in that sense.

"If many conspire to counterfeit, or counsel, or abet it, and one of them doth the fact upon that counselling or conspiracy, it is treason in all, and they may be all indicted for counterfeiting generally within the statute, for in such case, in treason, all are principals."

This is laid down as applicable singly to the treason of counterfeiting the coin, and is not applied by Hale to other treasons. Had he designed to apply the principle universally, he would have stated it as a general proposition; he would have laid it down in treating on other branches of the statute as well as in the chapter respecting the coin; he would have laid it down when treating on indictments generally. But he has done neither. Every sentiment bearing in any manner on this point,

4 Cr. 497.

which is to be found in Lord Hale, while on the doctrine of levying war, or on the general doctrine of indictments, militates against the opinion that he considered the proposition as more extensive than he has declared it to be. No court could be justified in extending the dictum of a judge beyond its terms to cases, in which he has expressly treated, to which he has not himself applied it, and on which he, as well as others, has delivered opinions which that dictum would overrule. This would be the less justifiable, if there should be a clear legal distinction, indicated by the very terms in which the judge has expressed himself, between the particular case to which alone he has applied the dictum, and other cases to which the court is required to extend it.

There is this clear legal distinction. "They may," says Judge Hale, "be indicted for counterfeiting generally." But if many conspire to levy war, and some actually levy it, they may not be indicted for levying war generally. The books concur in declaring that they cannot be so indicted. A special overt act of levying war must be laid. This distinction between counterfeiting the coins, and that class of treasons among which levying war is placed, is taken in the statute of Edward III. That statute requires an overt act of levying war to be laid in the indictment, and does not require an overt act of counterfeiting the coin to be laid. If in a particular case, where a general indictment is sufficient, it be stated that the crime may be charged generally according to the legal effect of the act, it does not follow that in other cases, where a general indictment would be insufficient, where an overt act must be laid, that this overt act need not be laid according to the real fact. Hale, then, is to be reconciled with himself, and with the general principles of law, only by permitting the limits which he has himself given to his own dictum to remain where he had placed them.

In page 238 Hale is speaking generally of the receiver of a traitor, and is stating in what such receiver partakes of an accessory. 1st. "His indictment must be special of the receipt, and not generally that he did the thing, which may be otherwise in case of one that is procurer, counsellor, or consenter."

4 Cr. 498.

The words "may be otherwise" do not clearly convey the idea that it is universally otherwise. In all cases of a receiver the indictment must be special on the receipt, and not general. The words, it "may be otherwise in case of a procurer," &c., signify that it may be otherwise in all treasons, or that it may be otherwise in some treasons. If it may be otherwise in some treasons without contradicting the doctrines of Hale himself, as well as of other writers, but cannot be otherwise in all treasons without such contradiction, the fair construction is that Hale used these words in their restricted sense; that he used them in reference to treasons in which a general indictment would lie, not to treasons where a general indictment would not lie, but an overt act of the treason must be charged. The two passages of Hale thus construed may, perhaps, be law, and may leave him consistent with himself. It appears to the court to be the fair way of construing them.

These observations relative to the passages quoted from Hale apply to that quoted from East, who obviously copies from Hale, and relies upon his authority.

Upon this point, Keeling, 26, and 1 Hale, 626, have also been relied upon. It is stated in both, that, if a man be indicted as a principal and acquitted, he cannot afterwards be indicted as accessory before the fact. Whence it is inferred, not without reason, that evidence of accessorial guilt may be received on such an indictment. Yet no case is found in which the question has been made and decided. The objection has never been taken at a trial and overruled, nor do the books say it would be overruled. Were such a case produced, its application would be questionable. Keeling says, an accessory before the fact is *quodam modo*, in some manner, guilty of the fact. The law may not require that the manner should be stated, for in felony it does not require that an overt act should be laid. The indictment, therefore, may be general. But an overt act of levying war must be laid. These cases, then, prove, in their utmost extent, no more than the cases previously cited from Hale and East. This distinction between indictments which may state

the fact generally, and those which must lay it specially, bear some analogy to a general and a special action on the case. In a general action, the declaration may lay the assumpsit according to the legal effect of the transaction, but in a special action on the case the declaration must state the material circumstances truly, and they must be proved, as stated. This distinction also derives some aid from a passage in Hale, 625, immediately preceding that which has been cited at the bar. He says, "If A. be indicted as principal, and B. as accessory before or after, and both be acquitted, yet B. may be indicted as principal, and the former acquittal as accessory is no bar."

The crimes, then, are not the same, and may not indifferently be tried under the same indictment. But why is it that an acquittal as principal may be pleaded in bar to an indictment as accessory, while an acquittal as accessory may not be pleaded in bar to an indictment as principal? If it be answered that the accessorial crime may be given in evidence on an indictment as principal, but that the principal crime may not be given in evidence on an indictment as accessory, the question recurs, On what legal ground does this distinction stand? I can imagine only this. An accessory being *quodam modo* a principal, in indictments, where the law does not require the manner to be stated, which need not be special evidence of accessorial guilt, if the punishment be the same, may possibly be received; but every indictment as an accessory must be special. The very allegation that he is an accessory must be a special allegation, and must show how he became an accessory. The charges of this special indictment, therefore, must be proved as laid, and no evidence which proves the crime in a form substantially different can be received. If this be the legal reason for the distinction, it supports the exposition of these dicta which has been given. If it be not the legal reason, I can conceive no other.

But suppose the law to be as is contended by the counsel for the United States. Suppose an indictment, charging an individual with personally assembling among others, and thus levying war, may be satisfied with the proof that he caused the assemblage. What effect will this law have upon this case?

4 Cr. 499.

The guilt of the accused, if there be any guilt, does not consist in the assemblage, for he was not a member of it. The simple fact of assemblage no more affects one absent man than another. His guilt, then, consists in procuring the assemblage, and upon this fact depends his criminality. The proof relative to the character of an assemblage must be the same whether a man be present or absent. In the general, to charge any individual with the guilt of an assemblage, the fact of his presence must be proved. It constitutes an essential part of the overt act. If, then, the procurement be substituted in the place of presence, does it not also constitute an essential part of the overt act? Must it not also be proved? Must it not be proved in the same manner that presence must be proved? If in one case the presence of the individual makes the guilt of the assemblage his guilt, and in the other case the procurement by the individual makes the guilt of the assemblage his guilt, then presence and procurement are equally component parts of the overt act, and equally require two witnesses.

Collateral points may, say the books, be proved according to the course of the common law; but is this a collateral point? Is the fact, without which the accused does not participate in the guilt of the assemblage, if it was guilty, a collateral point? This cannot be. The presence of the party, where presence is necessary, being a part of the overt act, must be positively proved by two witnesses. No presumptive evidence, no facts from which presence may be conjectured or inferred, will satisfy the constitution and the law. If procurement take the place of presence, and become part of the overt act, then no presumptive evidence, no facts from which the procurement may be conjectured or inferred, can satisfy the constitution and the law. The mind is not to be led to the conclusion that the individual was present, by a train of conjectures or inferences, or of reasoning; the fact must be proved by two witnesses. Neither where procurement supplies the want of presence is the mind to be conducted to the conclusion that the accused procured the assembly, by a train of conjectures or inferences, or of reason-

4 Cr. 499.

ing; the fact itself must be proved by two witnesses, and must have been committed within the district.

It is said that the advising or procurement of treason is a secret transaction which can scarcely ever be proved in the manner required by this opinion. The answer which will readily suggest itself is, that the difficulty of proving a fact will not justify conviction without proof. Certainly it will not justify conviction without a direct and positive witness in a case where the constitution requires two. The more correct inference from this circumstance would seem to be that the advising of the fact is not within the constitutional definition of the crime. To advise or procure a treason is in the nature of conspiring or plotting treason, which is not treason in itself.

If, then, the doctrines of Keeling, Hale, and East are to be understood in the sense in which they are pressed by the counsel for the prosecution, and are applicable in the United States, the fact that the accused procured the assemblage on Blennerhassett's island must be proved, not circumstantially, but positively by two witnesses, to charge him with that assemblage. But there are still other most important considerations, which must be well weighed before this doctrine can be applied to the United States.

The eighth amendment to the constitution has been pressed with great force, and it is impossible not to feel its application to this point. The accused cannot be truly said to be "informed of the nature and cause of the accusation," unless the indictment shall give him that notice which may reasonably suggest to him the point on which the accusation turns, so that he may know the course to be pursued in his defence.

It is also well worthy of consideration that this doctrine, so far as it respects treason, is entirely supported by the operation of the common law, which is said to convert the accessory before the fact into the principal, and to make the act of the principal his act. The accessory before the fact is not said to have levied war. He is not said to be guilty under the statute. But the common law attaches to him the guilt of the fact which he

4 Cr. 500.

has advised or procured, and, as contended, makes it his act. This is the operation of the common law, not the operation of the statute. It is an operation, then, which can only be performed where the common law exists to perform it. It is the creature of the common law, and the creature presupposes its creator. To decide, then, that this doctrine is applicable to the United States, would seem to imply the decision that the United States, as a nation, have a common law which creates and defines the punishment of crimes accessorial in their nature. It would imply the further decision that these accessorial crimes are not in the case of treason excluded by the definition of treason given in the constitution. I will not pretend that I have not individually an opinion on these points, but it is one which I should give only in a case absolutely requiring it, unless I could confer respecting it with the judges of the supreme court.

I have said that this doctrine cannot apply to the United States without implying those decisions respecting the common law which I have stated, because, should it be true, as is contended, that the constitutional definition of treason comprehends him who advises or procures an assemblage that levies war, it would not follow that such adviser or procurer might be charged as having been present at the assemblage. If the adviser or procurer is within the definition of levying war, and, independent of the agency of the common law, does actually levy war, then the advisement or procurement is an overt act of levying war. If it be the overt act on which he is to be convicted, then it must be charged in the indictment, for he can only be convicted on proof of the overt acts which are charged.

To render this distinction more intelligible, let it be recollected, that, although it should be conceded, that, since the statute of William and Mary, he who advises or procures a treason may in England be charged as having committed that treason,—by virtue of the common-law operation, which is said, so far as respects the indictment, to unite the accessorial to the principal offence, and permit them to be charged as one,—yet it can never be conceded that he who commits one overt act

4 Cr. 501.

under the statute of Edward can be charged and convicted on proof of another overt act. If, then, procurement be an overt act of treason under the constitution, no man can be convicted for the procurement under an indictment charging him with actually assembling, whatever may be the doctrine of the common law in the case of an accessorial offender.

It may not be improper in this place again to advert to the opinion of the supreme court, and to show that it contains nothing contrary to the doctrine now laid down. That opinion is that an individual may be guilty of treason "who has not appeared in arms against his country; that, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable object, all those who perform any part however minute or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors."

This opinion does not touch the case of a person who advises or procures an assemblage, and does nothing further. The advising certainly, and perhaps the procuring, is more in the nature of a conspiracy to levy war than of the actual levying of war. According to the opinion, it is not enough to be leagued in the conspiracy, and that war be levied, but it is also necessary to perform a part; that part is the act of levying war. This part, it is true, may be minute; it may not be the actual appearance in arms, and it may be remote from the scene of action, that is, from the place where the army is assembled; but it must be a part, and that part must be performed by a person who is leagued in the conpiracy. This part, however minute or remote, constitutes the overt act on which alone the person who performs it can be convicted.

The opinion does not declare that the person who has performed this remote and minute part may be indicted for a part which was in truth performed by others, and convicted on their overt acts. It amounts to this, and nothing more, that when war is actually levied, not only those who bear arms, but those also who are leagued in the conspiracy, and who perform the

4 Cr. 501.

various distinct parts which are necessary for the prosecution of war, do, in the sense of the constitution, levy war. It may possibly be the opinion of the supreme court that those who procure a treason, and do nothing further, are guilty under the constitution; I only say that opinion has not yet been given; still less has it been indicated that he who advises shall be indicted as having performed the fact.

It is, then, the opinion of the court that this indictment can be supported only by testimony which proves the accused to have been actually or constructively present when the assemblage took place on Blennerhassett's island, or by the admission of the doctrine that he who procures an act may be indicted as having performed that act.

It is further the opinion of the court that there is no testimony whatever which tends to prove that the accused was actually or constuctively present when that assemblage did take place. Indeed, the contrary is most apparent. With respect to admitting proof of procurement to establish a charge of actual presence, the court is of opinion, that, if this be admissible in England on an indictment for levying war, which is far from being conceded, it is admissible only by virtue of the operation of the common law upon the statute, and therefore is not admissible in this country unless by virtue of a similar operation; a point far from being established, but on which, for the present, no opinion is given.* If, however, this point be established, still the procurement must be proved in the same manner, and by the same kind of testimony, which would be required to prove actual presence.

The second point in this division of the subject is the necessity of adducing the record of the previous conviction of some one person who committed the fact alleged to be treasonable.

This point presupposes the treason of the accused, if any has been committed, to be accessorial in its nature. Its being of this description, according to the British authorities, depends on the presence or absence of the accused at the time the fact was committed. The doctrine on this subject is well understood,

4 Cr. 502.

has been most copiously explained, and need not be repeated. That there is no evidence of his actual or legal presence is a point already discussed and decided. It is, then, apparent, that, but for the exception to the general principle which is made in cases of treason, those who assembled at Blennerhassett's island, if that assemblage was such as to constitute the crime, would be principals, and those who might really have caused that assemblage, although, in truth, the chief traitors, would, in law, be accessories.

It is a settled principle in the law that the accessory cannot be guilty of a greater offence than his principal. The maxim is, *accessorius sequitur naturam sui principalis;* the accessory follows the nature of his principal. Hence results the necessity of establishing the guilt of the principal before the accessory can be tried. For the degree of guilt which is incurred by counselling or commanding the commission of a crime depends upon the actual commission of that crime. No man is an accessory to murder unless the fact has been committed.

The fact can only be established in a prosecution against the person by whom a crime has been perpetrated. The law supposes a man more capable of defending his own conduct than any other person, and will not tolerate that the guilt of A. shall be established in a prosecution against B. Consequently, if the guilt of B. depends on the guilt of A., A. must be convicted before B. can be tried. It would exhibit a monstrous deformity, indeed, in our system, if B. might be executed for being accessory to a murder committed by A., and A. should afterwards, upon a full trial, be acquitted of the fact. For this obvious reason, although the punishment of a principal and accessory was originally the same, and although in many instances it is still the same, the accessory could in no case be tried before the conviction of his principal, nor can he yet be tried previous to such conviction, unless he requires it, or unless a special provision to that effect be made by statute.

If, then, this was a felony, the prisoner at the bar could not be tried until the crime was established by the conviction of the person by whom it was actually perpetrated.

4 Cr. 503.

Is the law otherwise in this case, because in treason all are principals?

Let this question be answered by reason and by authority.

Why is it that in felonies, however atrocious, the trial of the accessory can never precede the conviction of the principal? Not because the one is denominated the principal, and the other the accessory, for that would be ground on which a great law-principle could never stand. Not because there was in fact a difference in the degree of moral guilt, for in the case of murder committed by a hardy villain for a bribe, the person plotting the murder and giving the bribe is, perhaps, of the two the blacker criminal; and, were it otherwise, this would furnish no argument for precedence in trial.

What, then, is the reason?

It has been already given. The legal guilt of the accessory depends on the guilt of the principal; and the guilt of the principal can only be established in a prosecution against himself.

Does not this reason apply in full force to a case of treason?

The legal guilt of the person who planned the assemblage on Blennerhassett's island depends not simply on the criminality of the previous conspiracy, but on the criminality of that assemblage. If those who perpetrated the fact be not traitors, he who advised the fact cannot be a traitor. His guilt, then, in contemplation of law, depends on theirs, and their guilt can only be established in a prosecution against themselves. Whether the adviser of this assemblage be punishable with death as a principal or as an accessory, his liability to punishment depends on the degree of guilt attached to an act which has been perpetrated by others, and which, if it be a criminal act, renders them guilty also. His guilt, therefore, depends on theirs, and their guilt cannot be legally established in a prosecution against him.

The whole reason of the law, then, relative to the principal and accessory, so far as respects the order of trial, seems to apply in full force to a case of treason committed by one body of men in conspiracy with others who are absent.

4 Cr. 503.

If from reason we pass to authority, we find it laid down by Hale, Foster, and East, in the most explicit terms, that the conviction of some one who has committed the treason must precede the trial of him who has advised or procured it. This position is also maintained by Leach, in his notes on Hawkins, and is not, so far as the court has discovered, anywhere contradicted.

These authorities have been read and commented on at such length that it cannot be necessary for the court to bring them again into view. It is the less necessary, because it is not understood that the law is controverted by the counsel for the United States.

It is, however, to be contended that the prisoner has waived his right to demand the conviction of some one person who was present at the fact, by pleading to his indictment.

Had this indictment even charged the prisoner according to the truth of the case, the court would feel some difficulty in deciding that he had by implication waived his right to demand a species of testimony essential to his conviction. The court is not prepared to say that the act which is to operate against his rights did not require that it should be performed with a full knowledge of its operation. It would seem consonant to the usual course of proceeding in other respects, in criminal cases, that the prisoner should be informed that he had a right to refuse to be tried until some person who committed the act should be convicted, and that he ought not to be considered as waiving the right to demand the record of conviction, unless, with the full knowledge of that right, he consented to be tried. The court, however, does not decide what the law would be in such a case. It is unnecessary to decide it, because pleading to an indictment, in which a man is charged as having committed an act, cannot be construed to waive a right which he would have possessed, had he been charged with having advised the act. No person indicted as a principal can be expected to say, I am not a principal, I am an accessory; I did not commit, I only advised the act.

The authority of the English cases on this subject depends in a great measure on the adoption of the common-law doctrine of accessorial treasons. If that doctrine be excluded, this branch may not be directly applicable to treasons committed within the United States. If the crime of advising or procuring a levying of war be within the constitutional definition of treason, then he who advises or procures it must be indicted on the very fact; and the question, whether the treasonableness of the act may be decided in the first instance in the trial of him who procured it, or must be decided in the trial of one who committed it, will depend upon the reason, as it respects the law of evidence, which produced the British decisions with regard to the trial of principal and accessory, rather than on the positive authority of those decisions.

This question is not essential in the present case, because, if the crime be within the constitutional definition, it is an overt act of levying war, and, to produce a conviction, ought to have been charged in the indictment.

The law of the case being thus far settled, what ought to be the decision of the court on the present motion? Ought the court to sit and hear testimony which cannot affect the prisoner, or ought the court to arrest that testimony? On this question much has been said; much that may, perhaps, be ascribed to a misconception of the point really under consideration. The motion has been treated as a motion confessedly made to stop relevant testimony; and in the course of the argument it has been repeatedly stated, by those who oppose the motion, that irrelevant testimony may and ought to be stopped. That this statement is perfectly correct is one of those fundamental principles in judicial proceedings which is acknowledged by all, and is founded in the absolute necessity of the thing. No person will contend that in a civil or criminal case either party is at liberty to introduce what testimony he pleases, legal or illegal, and to consume the whole term in details of facts unconnected with the particular case. Some tribunal, then, must decide on the admissibility of testimony. The parties cannot constitute

4 Cr. 505.

this tribunal, for they do not agree. The jury connot constitute it, for the question is, whether they shall hear the testimony or not. Who, then, but the court can constitute it? It is of necessity the peculiar province of the court to judge of the admissibility of testimony. If the court admit improper or reject proper testimony, it is an error of judgment; but it is an error committed in the direct exercise of their judicial functions.

The present indictment charges the prisoner with levying war against the United States, and alleges an overt act of levying war. That overt act must be proved, according to the mandates of the constitution and of the act of congress, by two witnesses. It is not proved by a single witness. The presence of the accused has been stated to be an essential component part of the overt act in this indictment, unless the common-law principle respecting accessories should render it unnecessary; and there is not only no witness who has proved his actual or legal presence, but the fact of his absence is not controverted. The counsel for the prosecution offer to give in evidence subsequent transactions, at a different place, and in a different state, in order to prove—what? The overt act laid in the indictment? That the prisoner was one of those who assembled at Blennerhassett's island? No, that is not alleged. It is well known that such testimony is not competent to establish such a fact. The constitution and law require that the fact should be established by two witnesses, not by the establishment of other facts from which the jury might reason to this fact. The testimony, then, is not relevant. If it can be introduced, it is only in the character of corroborative or confirmatory testimony, after the overt act has been proved by two witnesses in such manner that the question of fact ought to be left with the jury. The conclusion, that in this state of things no testimony can be admissible, is so inevitable that the counsel for the United States could not resist it. I do not understand them to deny, that, if the overt act be not proved by two witnesses so as to be submitted to the jury, all other testimony must be irrelevant, because no other testimony can prove the act. Now an assem-

4 Cr. 505.

blage on Blennerhassett's island is proved by the requisite number of witnesses, and the court might submit it to the jury, whether that assemblage amounted to a levying of war ; but the presence of the accused at that assemblage being nowhere alleged, except in the indictment, the overt act is not proved by a single witness, and, of consequence, all other testimony must be irrelevant.

The only difference between this motion as made, and the motion in the form which the counsel for the United States would admit to be regular, is this. It is now general, for the rejection of all testimony. It might be particular with respect to each witness as adduced. But can this be wished, or can it be deemed necessary ? If enough is proved to show that the indictment cannot be supported, and that no testimony, unless it be of that description which the attorney for the United States declares himself not to possess, can be relevant, why should a question be taken on each witness ?

The opinion of this court on the order of testimony has frequently been adverted to as deciding this question against the motion.

If a contradiction between the two opinions does exist, the court cannot perceive it. It was said that levying war is an act compounded of law and fact, of which the jury, aided by the court, must judge. To that declaration the court still adheres.

It was said, that, if the overt act was not proved by two witnesses, no testimony in its nature corroborative or confirmatory was admissible, or could be relevant.

From that declaration there is certainly no departure. It has been asked, in allusion to the present case, if a general commanding an army should detach troops for a distant service, would the men composing that detachment be traitors, and would the commander in chief escape punishment ?

Let the opinion which has been given answer this question. Appearing at the head of an army would, according to this opinion, be an overt act of levying war ; detaching a military corps from it for military purposes might also be an overt act of

4 Cr. 506.

levying war. It is not pretended that he would not be punishable for these acts ; it is only said that he may be tried and convicted on his own acts in the state where those acts were committed, not on the acts of others in the state where those others acted.

Much has been said, in the course of the argument, on points on which the court feels no inclination to comment particularly, but which may, perhaps, not improperly receive some notice.

That this court dares not usurp power is most true.

That this court dares not shrink from its duty is not less true.

No man is desirous of placing himself in a disagreeable situation. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he has no choice in the case ; if there is no alternative presented to him but a dereliction of duty, or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country, who can hesitate which to embrace.

That gentlemen, in a case the most interesting, in the zeal with which they advocate particular opinions, and under the conviction in some measure produced by that zeal, should on each side press their arguments too far, should be impatient at any deliberation in the court, and should suspect or fear the operation of motives to which alone they can ascribe that deliberation, is, perhaps, a fraility incident to human nature ; but if any conduct on the part of the court could warrant a sentiment that they would deviate to the one side or the other from the line prescribed by duty and by law, that conduct would be viewed by the judges themselves with an eye of extreme severity, and would long be recollected with deep and serious regret.

The arguments on both sides have been intently and deliberately considered. Those which could not be noticed, since to notice every argument and authority would swell this opinion to a volume, have not been disregarded. The result of the whole is a conviction, as complete as the mind of the court is

capable of receiving on a complex subject, that the motion must prevail.

No testimony, relative to the conduct or declarations of the prisoner elsewhere and subsequent to the transaction on Blennerhassett's island, can be admitted; because such testimony, being in its nature merely corroborative, and incompetent to prove the overt act in itself, is irrelevant, until there be proof of the overt act by two witnesses.

This opinion does not comprehend the proof by two witnesses that the meeting on Blennerhassett's island was procured by the prisoner. On that point the court, for the present, withholds its opinion, for reasons which have been already assigned, and as it is understood, from the statements made on the part of the prosecution, that no such testimony exists. If there be such, let it be offered and the court will decide upon it.

The jury have now heard the opinion of the court on the law of the case. They will apply that law to the facts, and will find a verdict of guilty or not guilty as their own consciences may direct.

4 Cr. 507.

THE BANK OF THE UNITED STATES *v.* DEVEAUX AND OTHERS.

FEBRUARY TERM, 1809.

[5 Cranch's Reports, 61-92.]

In 1805 the state of Georgia passed a law taxing the Branch Bank of the United States at Savannah ; the tax was not paid, and the state officers entered the bank and seized two thousand dollars. The bank sued Deveaux, the state officer who authorized the entry, and also the one who made the entry, in trespass, before the United States circuit court for the district of Georgia; the defendants denied the jurisdiction of the court, and the case was brought before the supreme bench. The two questions which were made in the case are presented in the following opinion as delivered by the chief justice :—

Two points have been made in this cause.

1. That a corporation, composed of citizens of one state, may sue a citizen of another state in the federal courts.

2. That a right to sue in those courts is conferred on this bank by the law which incorporates it.

The last point will be first considered.

The judicial power of the United States, as defined in the constitution, is dependent, 1st, On the nature of the case ; and, 2d, On the character of the parties.

By the judicial act, the jurisdiction of the circuit courts is extended to cases where the constitutional right to plead and be impleaded in the courts of the union depends on the character of the parties ; but where that right depends on the nature of the case, the circuit courts derive no jurisdiction from that act, except in the single case of a controversy between citizens of the same state, claiming lands under grants from different states.

Unless, then, jurisdiction over this cause has been given to the circuit court by some other than the judicial act, the bank of the United States had not a right to sue in that court, upon the principle that the case arises under a law of the United States.

The plaintiffs contend that the incorporating act confers this jurisdiction.

That act creates the corporation, gives it a capacity to make contracts and to acquire property, and enables it "to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in courts of record, or any other place whatsoever."

This power, if not incident to a corporation, is conferred by every incorporating act, and is not understood to enlarge the jurisdiction of any particular court, but to give a capacity to the corporation to appear, as a corporation, in any court which would by law have cognizance of the cause, if brought by individuals. If jurisdiction is given by this clause to the federal courts, it is equally given to all courts having original jurisdiction, and for all sums, however small they may be.

But the ninth article of the seventh section of the act furnishes a conclusive argument against the construction for which the plaintiffs contend. That section subjects the president and directors, in their individual capacity, to the suit of any person aggrieved by their putting into circulation more notes than are permitted by law, and expressly authorizes the bringing of that action in the federal or state courts.

This evinces the opinion of congress that the right to sue does not imply a right to sue in the courts of the union, unless it be expressed. This idea is strengthened also by the law respecting patent rights. That law expressly recognizes the right of the patentee to sue in the circuit courts of the United States.

The court, then, is of opinion that no right is conferred on the bank, by the act of incorporation, to sue in the federal courts.

2. The other point is one of much more difficulty.

The jurisdiction of this court being limited, so far as respects the character of the parties in this particular case, "to controversies between citizens of different states," both parties must be citizens to come within the description.

That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and consequently cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name. If the corporation be considered as a mere faculty, and not as a company of individuals who in transacting their joint concerns may use a legal name, they must be excluded from the courts of the union.

The duties of this court, to exercise jurisdiction where it is conferred, and not to usurp it where it is not conferred, are of equal obligation. The constitution, therefore, and the law are to be expounded, without a leaning the one way or the other, according to those general principles which usually govern in the construction of fundamental or other laws.

A constitution, from its nature, deals in generals, not in details. Its framers cannot perceive minute distinctions which arise in the progress of the nation, and therefore confine it to the establishment of broad and general principles.

The judicial department was introduced into the American constitution under impressions and with views which are too apparent not to be perceived by all. However true the fact may be, that the tribunals of the states will administer justice, as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states. Aliens, or citizens of different states, are not less susceptible of these apprehensions, nor can they be supposed to be less the objects of constitutional provision, because they are allowed to

sue by a corporate name. That name, indeed, cannot be an alien or a citizen; but the persons whom it represents may be the one or the other; and the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate name, for a corporate right, and the individual against whom the suit may be instituted. Substantially and essentially, the parties in such a case, where the members of the corporation are aliens, or citizens of a different state from the opposite party, come within the spirit and terms of the jurisdiction conferred by the constitution on the national tribunals.

Such has been the universal understanding on the subject. Repeatedly has this court decided causes between a corporation and an individual without feeling a doubt respecting its jurisdiction. Those decisions are not cited as authority; for they were made without considering this particular point; but they have much weight, as they show that this point neither occurred to the bar nor the bench; and that the common understanding of intelligent men is in favor of the right of incorporated aliens, or citizens of a different state from the defendant, to sue in the national courts. It is by a course of acute, metaphysical, and abstruse reasoning, which has been most ably employed on this occasion, that this opinion is shaken.

As our ideas of a corporation, its privileges, and its disabilities, are derived entirely from the English books, we resort to them for aid in ascertaining its character. It is defined as a mere creature of the law, invisible, intangible, and incorporeal. Yet when we examine the subject further, we find that corporations have been included within terms of description appropriated to real persons.

The statute of Henry VIII. concerning bridges and highways enacts, that bridges and highways shall be made and repaired by the "inhabitants of the city, shire, or riding," and that the justices shall have power to tax every "inhabitant of such city," &c., and that the collectors may "distrain every such inhabitant as shall be taxed and refuse payment thereof, in his lands, goods, and chattels."

Under this statute those have been construed inhabitants who hold lands within the city where the bridge to be repaired lies, although they reside elsewhere.

Lord Coke says, "Every corporation and body politic residing in any county, riding, city, or town corporate, or having lands or tenements in any shire, *quæ propriis manibus et sumptibus possident et habent*, are said to be inhabitants there, within the purview of this statute."

The tax is not imposed on the person, whether he be a member of the corporation or not, who may happen to reside on the lands; but is imposed on the corporation itself; and consequently this ideal existence is considered as an inhabitant when the general spirit and purpose of the law require it.

In the case of *The King* v. *Gardner* reported by Cowper, a corporation was decided by the court of the king's bench to come within the description of "occupiers or inhabitants." In that case the poor-rates, to which the lands of the corporation were declared to be liable, were not assessed to the actual occupant, for there was none, but to the corporation. And the principle established by the case appears to be, that the poor-rates, on vacant ground belonging to a corporation, may be assessed to the corporation, as being inhabitants or occupiers of that ground. In this case Lord Mansfield notices and overrules an inconsiderate dictum of Justice Yates, that a corporation could not be an inhabitant or occupier.

These opinions are not precisely in point; but they serve to show, that, for the general purposes and objects of a law, this invisible, incorporeal creature of the law may be considered as having corporeal qualities.

It is true, that, as far as these cases go, they serve to show that the corporation itself, in its incorporeal character, may be considered as an inhabitant or an occupier; and the argument from them would be more strong in favor of considering the corporation itself as endowed for this special purpose with the character of a citizen, than to consider the character of the individuals who compose it as a subject which the court can inspect,

5 Cr. 89.

when they use the name of the corporation for the purpose of asserting their corporate rights. Still, the cases show that this technical definition of a corporation does not uniformly circumscribe its capacities, but that courts for legitimate purposes will contemplate it more substantially.

There is a case, however, reported in 12 Modern Reports, which is thought precisely in point. The corporation of London brought a suit against Wood, by their corporate name, in the mayor's court. The suit was brought by the mayor and commonalty, and was tried before the mayor and aldermen. The judgment rendered in this cause was brought before the court of king's bench, and reversed, because the court was deprived of its jurisdiction by the character of the individuals who were members of the corporation.

In that case the objection that a corporation was an invisible, intangible thing, a mere incorporeal, legal entity, in which the characters of the individuals who composed it were completely merged, was urged and was considered. The judges unanimously declared that they would look beyond the corporate name, and notice the character of the individuals. In the opinions which were delivered seriatim, several cases are put which serve to illustrate the principle and fortify the decision.

The case of The Mayor and Commonalty v. Wood is the stronger because it is on the point of jurisdiction. It appears to the court to be a full authority for the case now under consideration. It seems not possible to distinguish them from each other.

If, then, the congress of the United States had in terms enacted that incorporated aliens might sue a citizen, or that the incorporated citizens of one state might sue a citizen of another state, in the federal courts, by their corporate name, this court would not have felt itself justified in declaring that such a law transcended the constitution.

The controversy is substantially between aliens, suing by a corporate name, and a citizen, or between citizens of one state, suing by a corporate name, and those of another state. When these are said to be substantially the parties of the controversy,

the court does not mean to liken it to the case of a trustee. A trustee is a real person, capable of being a citizen or an alien, who has the whole legal estate in himself. At law, he is the real proprietor, and he represents himself, and sues in his own right. But in this case the corporate name represents persons who are members of the corporation.

If the constitution would authorize congress to give the courts of the union jurisdiction in this case, in consequence of the character of the members of the corporation, then the judicial act ought to be construed to give it. For the term "citizen" ought to be understood as it is used in the constitution, and as it is used in other laws; that is, to describe the real persons who come into court, in this case, under their corporate name.

That corporations composed of citizens are considered by the legislature as citizens, under certain circumstances, is to be strongly inferred from the registering act. It never could be intended that an American registered vessel, abandoned to an insurance company composed of citizens, should lose her character as an American vessel; and yet this would be the consequence of declaring that the members of the corporation were, to every intent and purpose, out of view, and merged in the corporation.

The court feels itself authorized, by the case in 12 Modern Reports, on a question of jurisdiction, to look to the character of the individuals who compose the corporation; and they think that the precedents of this court, though they were not decisions on argument, ought not to be absolutely disregarded.

If a corporation may sue in the courts of the union, the court is of opinion that the averment in this case is sufficient.

Being authorized to sue in their corporate name, they could make the averment, and it must apply to the plaintiffs as individuals, because it could not be true as applied to the corporation.

Judgment reversed, plea in abatement overruled, and cause remanded.

5 Cr. 91.

THE UNITED STATES *v.* JUDGE PETERS.

FEBRUARY TERM, 1809.

[5 Cranch's Reports, 115-141.]

The United States district court for the district of Pennsylvania gave, in a certain admiralty case, sentence in favor of Gideon Olmstead and others against Elizabeth Serjeant and Esther Waters. A copy of this sentence was served on said Serjeant and Waters, which they refused to obey. Judge Peters of the district court was then applied to for a process which should enforce obedience, but this he would not grant. At the February term of 1808 the supreme court was applied to for a rule to the said judge, requiring him to show cause why a mandamus should not issue commanding him to grant the desired process. He made a return stating that the legislature of Pennsylvania had passed an act to protect Elizabeth Serjeant and Esther Waters against the process of any United States court issued under the suits in question, that he was unwilling to embroil the United States with Pennsylvania, and refused to grant the process in order to bring the case before the supreme court.

On the 20th of February Chief Justice Marshall delivered the opinion of the court; and as he gives the leading facts in this very complicated case, we need only say further that Serjeant and Waters were the executrixes of Rittenhouse, referred to. The opinion was in these words:—

With great attention, and with serious concern, the court has considered the return made by the judge for the district of Pennsylvania to the mandamus directing him to execute the sentence pronounced by him in the case of *Gideon Olmstead and others* v. *Rittenhouse's Executrixes*, or to show cause for not so doing. The cause shown is an act of the legislature of

5 Cr. 135.

Pennsylvania, passed subsequent to the rendition of his sentence. This act authorizes and requires the governor to demand, for the use of the state of Pennsylvania, the money which had been decreed to Gideon Olmstead and others, and which was in the hands of the executrixes of David Rittenhouse; and in default of payment, to direct the attorney general to institute a suit for the recovery thereof. This act further authorizes and requires the governor to use any further means he may think necessary for the protection of what it denominates "the just rights of the state," and also to protect the persons and properties of the said executrixes of David Rittenhouse, deceased, against any process whatever issued out of any federal court in consequence of their obedience to the requisition of the said act.

If the legislatures of the several states may at will annul the judgments of the courts of the United States, and destroy the right acquired under those judgments, the constitution itself becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all; and the people of Pennsylvania, not less than the citizens of every other state, must feel a deep interest in resisting principles so destructive of the union, and in averting consequences so fatal to themselves.

The act in question does not, in terms, assert the universal right of the state to interpose in every case whatever; but assigns, as a motive for its interposition in this particular case, that the sentence the execution of which it prohibits was rendered in a cause over which the federal courts have no jurisdiction.

If the ultimate right to determine the jurisdiction of the courts of the union is placed by the constitution in the several state legislatures, then this act concludes the subject; but if that power necessarily resides in the supreme judicial tribunal of the nation, then the jurisdiction of the district court of Pennsylvania over the case in which that jurisdiction was exercised

ought to be most deliberately examined; and the act of Pennsylvania, with whatever respect it may be considered, cannot be permitted to prejudice the question.

In the early part of the war between the United States and Great Britain, Gideon Olmstead and others, citizens of Connecticut, who say they had been caried to Jamaica as prisoners, were employed as part of the crew of the sloop Active, bound from Jamaica to New York, and laden with a cargo for the use of the British army in that place. On the voyage they seized the vessel, confined the captain, and sailed for Egg Harbor. In sight of that place the Active was captured by the Convention, an armed ship belonging to the state of Pennsylvania, brought into port, libelled, and condemned as prize to the captors. From this sentence Gideon Olmstead and others, who claimed the vessel and cargo, appealed to the court of appeals established by congress, by which tribunal the sentence of condemnation was reversed, the Active and her cargo condemned as prize to the claimants, and process was directed to issue out of the court of admiralty, commanding the marshal of that court to sell the said vessel and cargo and pay the net proceeds to the claimants.

The mandate of the appellate court was produced in the inferior court, the judge of which admitted the general jurisdiction of the court established by congress, as an appellate court; but denied its power to control the verdict of a jury which had been rendered in favor of the captors, the officers and crew of the Convention; and therefore refused obedience to the mandate; but directed the marshal to make the sale, and after deducting charges, to bring the residue of the money into court, subject to its future order.

The claimants then applied to the judges of appeals for an injunction to prohibit the marshal from paying the money arising from the sales into the court of admiralty; which was awarded, and served upon him; in contempt of which, on the 4th of Janurary, 1778, he paid the money to the judge, who acknowledged the receipt thereof at the foot of the marshal's return.

5 Cr. 137.

On the 1st of May, 1799, George Ross, the judge of the court of admiralty, delivered to David Rittenhouse, who was then treasurer of the state of Pennsylvania, the sum of £11,496 9s. 9d. in loan-office certificates; which was the proportion of the prize-money to which that state would have been entitled, had the sentence of the court of admiralty remained in force. On the same day David Rittenhouse executed a bond of indemnity to George Ross, in which, after reciting that the money was paid to him for the use of the state of Pennsylvania, he binds himself to repay the same, should the said George Ross be thereafter compelled, by due course of law, to pay that sum according to the decree of the court of appeals.

These loan-office certificates were in the name of Matthew Clarkson, who was marshal of the court of admiralty, and were dated the 6th of November, 1778. Indents were issued on them to David Rittenhouse, and the whole principal and interest were afterwards funded by him, in his own name, under the act of congress making provision for the debt of the United States.

Among the papers of David Rittenhouse was a memorandum, made by himself at the foot of a list of the certificates mentioned above, in these words: "Note. The above certificates will be the property of the state of Pennsylvania, when the state releases me from the bond I gave, in 1778, to indemnify George Ross, Esq., judge of the admiralty, for paying the fifty original certificates into the treasury, as the state's share of the prize."

The state did not release David Rittenhouse from the bond mentioned in this memorandum. These certificates remained in the private possession of David Rittenhouse, who drew the interest on them during his life, and after his death they remained in possession of his representatives, against whom the libel in this case was filed, for the purpose of carrying into execution the decree of the court of appeals.

While this suit was depending, the state of Pennsylvania forbore to assert its title, and in January, 1803, the court

5 Cr. 138.

decreed in favor of the libellants; soon after which the legislature passed the act which has been stated.

It is contended that the federal courts were deprived of jurisdiction in this cause by that amendment of the constitution which exempts states from being sued in those courts by individuals. This amendment declares, "that the judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

The right of a state to assert, as plaintiff, any interest it may have in a subject which forms the matter of controversy between individuals, in one of the courts of the United States, is not affected by this amendment; nor can it be so construed as to oust the court of its jurisdiction, should such claim be suggested. The amendment simply provides that no suit shall be commenced or prosecuted against a state. The state cannot be made a defendant to a suit brought by an individual; but it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one state against citizens of a different state, where a state is not necessarily a defendant. In this case the suit was not instituted against the state or its treasurer, but against the executrixes of David Rittenhouse, for the proceeds of a vessel condemned in the court of admiralty which were admitted to be in their possession. If these proceeds had been the actual property of Pennsylvania, however wrongfully acquired, the disclosure of that fact would have presented a case on which it was unnecessary to give an opinion; but it certainly can never be alleged that a mere suggestion of title in a state property, in possession of an individual, must arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title.

If the suggestion in this case be examined, it is deemed perfectly clear that no title whatever to the certificates in question was vested in the state of Pennsylvania.

5 Cr. 139.

By the highest judicial authority of the nation it has been long since decided that the court of appeals erected by congress had full authority to revise and correct the sentences of the courts of admiralty of the several states in prize causes. That question, therefore, is at rest. Consequently, the decision of the court of appeals in this case annulled the sentence of the court of admiralty, and extinguished the interest of the state of Pennsylvania in the Active and her cargo which was acquired by that sentence. The full right to that property was immediately vested in the claimants, who might rightfully pursue it, into whosesoever hands it might come. These certificates, in the hands, first, of Matthew Clarkson, the marshal, and afterwards of George Ross, the judge of the court of admiralty, were the absolute property of the claimants. Nor did they change their character on coming into the possession of David Rittenhouse.

Although Mr. Rittenhouse was treasurer of the state of Pennsylvania, and the bond of indemnity which he executed states the money to have been paid to him for the use of the state of Pennsylvania, it is apparent that he held them in his own right, until he should be completely indemnified by the state. The evidence to this point is conclusive. The original certificates do not appear to have been deposited in the state treasury, to have been designated in any manner as the property of the state, or to have been delivered over to the successor of David Rittenhouse. They remained in his possession. The indents, issued upon them for interest, were drawn by David Rittenhouse, and preserved with the original certificates. When funded as part of the debt of the United States, they were funded by David Rittenhouse, and the interest was drawn by him. The note made by himself at the foot of the list which he preserved, as explanatory of the whole transaction, demonstrates that he held the certificates as security against the bond he had executed to George Ross; and that bond was obligatory, not on the state of Pennsylvania, but on David Rittenhouse, in his private capacity.

These circumstances demonstrate, beyond the possibility of

5 Cr. 140.

doubt, that the property which represented the Active and her cargo was in possession, not of the state of Pennsylvania, but of David Rittenhouse, as an individual; after whose death it passed, like other property, to his representatives.

Since, then, the state of Pennsylvania had neither possession of, nor right to, the property on which the sentence of the district court was pronounced, and since the suit was neither commenced nor prosecuted against that state, there remains no pretext for the allegation that the case is within that amendment of the constitution which has been cited; and consequently, the state of Pennsylvania can possess no constitutional right to resist the legal process which may be directed in this cause.

It will be readily conceived that the order, which this court is enjoined to make by the high obligations of duty and of law, is not made without extreme regret at the necessity which has induced the application. But it is a solemn duty, and therefore must be performed. A peremptory mandamus must be awarded.

5 Cr. 141.

FLETCHER *v.* PECK.

FEBRUARY TERM, 1810.

[6 Cranch's Reports, 87–148.]

On the 7th of January, 1795, the legislature of Georgia passed an act authorizing a patent to issue to a company called "The Georgia Company," for a certain tract of land within the limits of that state; which patent was regularly issued on the 13th of that month. This land passed from hand to hand, until on the 14th of May, 1803, Peck, the defendant in this action, conveyed by deed to Fletcher, the plaintiff, fifteen thousand acres of the original tract lying undivided therein. Peck in this deed covenanted that Georgia, at the time her patent issued, was legally the owner in fee of the land in question, subject only to the extinguishment of the Indian title; that the legislature of Georgia had good right to sell the same; that the title given by Georgia had been legally conveyed to Peck; and that this title had been "in no way constitutionally or legally impaired by virtue of any consequent act of any subsequent legislature of the said state of Georgia." Fletcher, however, alleged that the legislature of Georgia had no right to sell the tract in question; that the members of the Georgia Company had promised members of the legislature, that, if they would vote for the act authorizing the patent to issue, they should have a share in the lands, by which, he alleged, the act was made of no avail, and so the title of the state of Georgia had never passed to Peck. And he alleged, further, that the legislature of Georgia, on the 13th of February, 1796, for the reason above stated, annulled the act granting a patent to the Georgia Company. He also alleged that on the 7th of January, 1795, the United States, and not Georgia, owned the lands in question.

Fletcher sued Peck in the circuit court for the district of

Massachusetts, when all the facts above related were alleged in the pleadings; judgment went against the plaintiff, however, who brought up the case before the supreme bench.

In the following opinion of the court, as delivered by Chief Justice Marshal, so many of the facts in the case are stated, that, with the statement given above, it will be intelligible without a detail of minor points.

The pleadings being now amended, this cause comes on again to be heard on sundry demurrers, and on a special verdict.

The suit was instituted on several covenants contained in a deed made by John Peck, the defendant in error, conveying to Robert Fletcher, the plaintiff in error, certain lands which were part of a large purchase made by James Gunn and others, in the year 1795, from the state of Georgia, the contract for which was made in the form of a bill passed by the legislature of that state.

The first count in the declaration sets forth a breach in the second covenant contained in the deed. The covenant is, "that the legislature of the state of Georgia, at the time of passing the act of sale aforesaid, had good right to sell and dispose of the same in manner pointed out by the said act." The breach assigned is that the legislature had no power to sell.

The plea in bar sets forth the constitution of the state of Georgia, and avers that the lands sold by the defendant to the plaintiff were within that state. It then sets forth the granting act, and avers the power of the legislature to sell and dispose of the premises as pointed out by the act.

To this plea the plaintiff below demurred, and the defendant joined in demurrer.

That the legislature of Georgia, unless restrained by its own constitution, possesses the power of disposing of the unappropriated lands within its own limits, in such a manner as its own judgment shall dictate, is a proposition not to be controverted.

The only question, then, presented by this demurrer for the consideration of the court, is this, Did the then constitution of the state of Georgia prohibit the legislature to dispose of the lands, which were the subject of this contract, in the manner stipulated by the contract?

The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

In this case the court can perceive no such opposition. In the constitution of Georgia, adopted in the year 1789, the court can perceive no restriction on the legislative power, which inhibits the passage of the act of 1795. The court cannot say, that, in passing that act, the legislature has transcended its powers, and violated the constitution.

In overruling the demurrer, therefore, to the first plea, the circuit court committed no error.

The third covenant is, that all the title which the state of Georgia ever had in the premises had been legally conveyed to John Peck, the grantor.

The second count assigns, in substance, as a breach of this covenant, that the original grantees from the state of Georgia promised and assured divers members of the legislature, then sitting in general assembly, that, if the said members would assent to, and vote for, the passing of the act, and if the said bill should pass, such members should have a share of, and be interested in, all the lands purchased from the said state by virtue of such law; and that divers of the said members, to whom the

said promises were made, were unduly influenced thereby, and under such influence did vote for the passing of the said bill; by reason whereof the said law was a nullity, &c.; and so the title of the state of Georgia did not pass to the said Peck, &c.

The plea to this count, after protesting that the promises it alleges were not made, avers, that, until after the purchase made from the original grantees by James Greenleaf, under whom the said Peck claims, neither the said James Greenleaf, nor the said Peck, nor any of the mesne vendors between the said Greenleaf and Peck, had any notice or knowledge that any such promises or assurances were made by the said original grantees, or either of them, to any of the members of the legislature of the state of Georgia.

To this plea the plaintiff demurred generally, and the defendant joined in the demurrer.

That corruption should find its way into the governments of our infant republics, and contaminate the very source of legislation, or that impure motives should contribute to the passage of a law, or the formation of a legislative contract, are circumstances most deeply to be deplored. How far a court of justice would in any case be competent, on proceedings instituted by the state itself, to vacate a contract thus formed, and to annul rights acquired under that contract by third persons having no notice of the improper means by which it was obtained, is a question which the court would approach with much circumspection. It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements, operating on members of the supreme sovereign power of a state, to the formation of a contract by that power, are examinable in a court of justice. If the principle be conceded that an act of the supreme sovereign power might be declared null by a court, in consequence of the means which procured it, still would there be much difficulty in saying to what extent those means must be applied to produce this effect. Must it be direct corruption, or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate

6 Cr. 130.

on a majority, or on what number of the members? Would the act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment?

If the majority of the legislature be corrupted, it may well be doubted whether it be within the province of the judiciary to control their conduct; and if less than a majority act from impure motives, the principle by which judicial interference would be regulated is not clearly discerned.

Whatever difficulties this subject might present, when viewed under aspects of which it may be susceptible, this court can perceive none in the particular pleadings now under consideration.

This is not a bill brought by the state of Georgia to annul the contract, nor does it appear to the court, by this count, that the state of Georgia is dissatisfied with the sale that has been made. The case, as made out in the pleadings, is simply this. One individual who holds lands in the state of Georgia, under a deed covenanting that the title of Georgia was in the grantor, brings an action of covenant upon this deed, and assigns as a breach that some of the members of the legislature were induced to vote in favor of the law which constituted the contract, by being promised an interest in it, and that therefore the act is a mere nullity.

This solemn question cannot be brought thus collaterally and incidentally before the court. It would be indecent in the extreme, upon a private contract between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a state. If the title be plainly deduced from a legislative act which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another founded on the allegation that the act is a nullity in consequence of the impure motives which influenced certain members of the legislature which passed the law.

The circuit court therefore did right in overruling this demurrer.

6 Cr. 131.

The fourth covenant in the deed is, that the title to the premises has been in no way constitutionally or legally impaired by virtue of any subsequent act of any subsequent legislature of the state of Georgia.

The third count recites the undue means practised on certain members of the legislature, as stated in the second count, and then alleges, that, in consequence of these practices and of other causes, a subsequent legislature passed an act annulling and rescinding the law under which the conveyance to the original grantees was made, declaring that conveyance void, and asserting the title of the state to the lands it contained. The count proceeds to recite at large this rescinding act, and concludes with averring, that, by reason of this act, the title of the said Peck in the premises was constitutionally and legally impaired, and rendered null and void.

After protesting, as before, that no such promises were made as stated in this count, the defendant again pleads that himself and the first purchaser under the original grantees, and all intermediate holders of the property, were purchasers without notice.

To this plea there is a demurrer and joinder.

The importance and the difficulty of the questions presented by these pleadings are deeply felt by the court.

The lands in controversy vested absolutely in James Gunn and others, the original grantees, by the conveyance of the governor, made in pursuance of an act of assembly to which the legislature was fully competent. Being thus in full possession of the legal estate, they, for a valuable consideration, conveyed portions of the land to those who were willing to purchase. If the original transaction was infected with fraud, these purchasers did not participate in it, and had no notice of it. They were innocent. Yet the legislature of Georgia has involved them in the fate of the first parties to the transaction, and, if the act be valid, has annihilated their rights also.

The legislature of Georgia was a party to this transaction; and for a party to pronounce its own deed invalid, whatever

cause may be assigned for its invalidity, must be considered as a mere act of power, which must find its vindication in a train of reasoning not often heard in courts of justice.

But the real party, it is said, are the people, and when their agents are unfaithful, the acts of those agents cease to be obligatory.

It is, however, to be recollected that the people can act only by these agents, and that, while within the powers conferred on them, their acts must be considered as the acts of the people. If the agents be corrupt, others may be chosen; and if their contracts be examinable, the common sentiment as well as common usage of mankind points out a mode by which this examination may be made, and their validity determined.

If the legislature of Georgia was not bound to submit its pretensions to those tribunals which are established for the security of property and to decide on human rights, if it might claim to itself the power of judging in its own case, yet there are certain great principles of justice, whose authority is universally acknowledged, that ought not to be entirely disregarded.

If the legislature be its own judge in its own case, it would seem equitable that its decision should be regulated by those rules which would have regulated the decision of a judicial tribunal. The question was in its nature a question of title, and the tribunal which decided it was either acting in the character of a court of justice, and performing a duty usually assigned to a court, or it was exerting a mere act of power in which it was controlled only by its own will.

If a suit be brought to set aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons, who are purchasers without notice, for a valuable consideration, cannot be disregarded. Titles which, according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect arising from the conduct of those who had held the property long before he acquired it, of which he had

no notice, that concealed defect cannot be set up against him. He has paid his money for a title good at law; he is innocent, whatever may be the guilt of others, and equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and the intercourse between man and man would be very seriously obstructed, if this principle be overturned.

A court of chancery, therefore, had a bill been brought to set aside the conveyance made to James Gunn and others, as being obtained by improper practices with the legislature, whatever might have been its decision as respected the original grantees, would have been bound by its own rules, and by the clearest principles of equity, to leave unmolested those who were purchasers, without notice, for a valuable consideration.

If the legislature felt itself absolved from those rules of property which are common to all the citizens of the United States, and from those principles of equity which are acknowledged in all our courts, its act is to be supported by its power alone, and the same power may devest any other individual of his lands, if it shall be the will of the legislature so to exert it.

It is not intended to speak with disrespect of the legislature of Georgia, or of its acts. Far from it. The question is a general question, and is treated as one. For although such powerful objections to a legislative grant as are alleged against this may not again exist, yet the principle on which alone this rescinding act is to be supported may be applied to every case to which it shall be the will of any legislature to apply it. The principle is this: that a legislature may by its own act devest the vested estate of any man whatever, for reasons which shall by itself be deemed sufficient.

In this case the legislature may have had ample proof that the original grant was obtained by practices which can never be too much reprobated, and which would have justified its abrogation, so far as respected those to whom crime was imputable. But the grant, when issued, conveyed an estate in fee simple to the grantees, clothed with all the solemnities which law can bestow. This estate was transferable; and those who pur-

chased parts of it were not stained by that guilt which infected the original transaction. Their case is not distinguishable from the ordinary case of purchasers of a legal estate, without knowledge of any secret fraud which might have led to the emanation of the original grant. According to the well known course of equity, their rights could not be affected by such fraud. Their situation was the same, their title was the same, with that of every other member of the community who holds land by regular conveyances from the original patentee.

Is the power of the legislature competent to the annihilation of such title, and to a resumption of the property thus held?

The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass, and that one legislature cannot abridge the powers of a succeeding legislature.

The correctness of this principle, so far as respects general legislation, can never be controverted. But if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estates, and if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact.

When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot devest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community.

It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?

To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public be in the nature of the legislative power, is well worthy of serious reflection.

6 Cr. 135.

It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments. How far the power of giving the law may involve every other power, in cases where the constitution is silent, never has been, and perhaps never can be definitely stated.

The validity of this rescinding act, then, might be doubted, were Georgia a single sovereign power. But Georgia cannot be viewed as a single, unconnected, sovereign power, on whose legislature no other restrictions are imposed than may be found in its own constitution. She is a part of a large empire; she is a member of the American union; and that union has a constitution, the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several states, which none claim a right to pass. The constitution of the United States declares that "no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."

Does the case now under consideration come within this prohibitory section of the constitution?

In considering this very interesting question we immediately ask ourselves, What is a contract? Is a grant a contract?

A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the governor. A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is therefore always estopped by his own grant.

Since, then, in fact, a grant is a contract executed, the obliga-

6 Cr. 136.

tion of which still continues, and since the constitution uses the general term "contracts," without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law, annulling conveyances betweeen individuals, and declaring that the grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the constitution, while an absolute conveyance remained unprotected.

If under a fair construction of the constitution, grants are comprehended under the term "contracts," is a grant from the state excluded from the operation of the provision? Is the clause to be considered as inhibiting the state from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself?

The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the state are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed.

Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights for the people of each state.

"No state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."

A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.

In this form, the power of the legislature over the lives and fortunes of individuals is expressly restrained. What motive, then, for implying, in words which import a general prohibition to impair the obligation of contracts, an exception in favor of the right to impair the obligation of those contracts into which the state may enter?

The state legislatures can pass no *ex post facto* law. An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is, then, prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared by some previous law to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual, in the form of a law annulling the title by which he holds that estate? The court can perceive no sufficient grounds for making this distinction. This rescinding act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. This cannot be effected in the form of an *ex post facto* law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?

The argument in favor of presuming an intention to except a case, not excepted by the words of the constitution, is susceptible of some illustration from a principle originally ingrafted in that instrument, though no longer a part of it. The constitution as passed gave the courts of the United States jurisdiction in suits brought against individual states. A state, then, which violated its own contract was suable in the courts of the United States for that violation. Would it have been a defence in such a suit to say that the state had passed a law absolving itself

from the contract? It is scarcely to be conceived that such a defence could be set up. And yet, if a state is neither restrained by the general principles of our political institutions, nor by the words of the constitution, from impairing the obligation of its own contracts, such a defence would be a valid one. This feature is no longer found in the constitution; but it aids in the construction of those clauses with which it was originally associated.

It is, then, the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the state of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.

In overruling the demurrer to the third plea, therefore, there is no error.

The first covenant in the deed is, that the state of Georgia, at the time of the act of the legislature thereof, entitled as aforesaid, was legally seized in fee of the soil thereof, subject only to the extinguishment of part of the Indian title thereon.

The fourth count assigns, as a breach of this covenant, that the right to the soil was in the United States, and not in Georgia.

To this count the defendant pleads that the state of Georgia was seized; and tenders an issue on the fact, in which the plaintiff joins. On this issue a special verdict is found.

The jury find the grant of Carolina by Charles Second to the Earl of Clarendon and others, comprehending the whole country, from 36 degrees, 30 minutes, north latitude, to 29 degrees, north latitude, and from the Atlantic to the South sea.

They find that the northern part of this territory was afterwards erected into a separate colony, and that the most northern part of the 35th degree of north latitude was the boundary line between North and South Carolina.

That seven of the eight proprietors of the Carolinas surrendered to George Second, in the year 1729, who appointed a governor of South Carolina.

That in 1732 George the Second granted to the Lord Viscount Percival and others seven-eighths of the territory between the Savannah and the Alatamaha, and extending west to the South sea; and that the remaining eighth part, which was still the property of the heir of Lord Carteret, one of the original grantees of Carolina, was afterwards conveyed to them. This territory was constituted a colony and called Georgia.

That the governor of South Carolina continued to exercise jurisdiction south of Georgia.

That in 1752 the grantees surrendered to the crown.

That in 1754 a governor was appointed by the crown, with a commission describing the boundaries of the colony.

That a treaty of peace was concluded between Great Britain and Spain, in 1763, in which the latter ceded to the former Florida, with Fort St. Augustin and the bay of Pensacola.

That in October, 1763, the King of Great Britain issued a proclamation, creating four new colonies, Quebec, East Florida, West Florida, and Grenada, and prescribing the bounds of each; and further declaring that all the lands between the Alatamaha and St. Mary's should be annexed to Georgia. The same proclamation contained a clause reserving, under the dominion and protection of the crown, for the use of the Indians, all the lands on the western waters, and forbidding a settlement on them, or a purchase of them from the Indians. The lands conveyed to the plaintiff lie on the western waters.

That in November, 1763, a commission was issued to the governor of Georgia, in which the boundaries of that province are described as extending westward to the Mississippi. A commission describing boundaries of the same extent was afterwards granted in 1764.

That a war broke out between Great Britain and her colonies, which terminated in a treaty of peace acknowledging them as sovereign and independent states.

That in April, 1787, a convention was entered into between the states of South Carolina and Georgia, settling the boundary-line between them.

The jury afterwards describe the situation of the lands mentioned in the plaintiff's declaration, in such manner that their lying within the limits of Georgia, as defined in the proclamation of 1763, in the treaty of peace, and in the convention between that state and South Carolina, has not been questioned.

The counsel for the plaintiff rest their argument on a single proposition. They contend that the reservation for the use of the Indians, contained in the proclamation of 1763, excepts the lands on the western waters from the colonies within whose bounds they would otherwise have been, and that they were acquired by the revolutionary war. All acquisitions during the war, it is contended, were made by the joint arms, for the joint benefit of the United States, and not for the benefit of any particular state.

The court does not understand the proclamation as it is understood by the counsel for the plaintiff. The reservation for the use of the Indians appears to be a temporary arrangement suspending, for a time, the settlement of the country reserved, and the powers of the royal governor within the territory reserved, but is not conceived to amount to an alteration of the boundaries of the colony. If the language of the proclamation be in itself doubtful, the commissions subsequent thereto, which were given to the governors of Georgia, entirely remove the doubt.

The question, whether the vacant lands within the United States became a joint property, or belonged to the separate states, was a momentous question, which, at one time, threatened to shake the American confederacy to its foundation. This important and dangerous contest has been compromised, and the compromise is not now to be disturbed.

It is the opinion of the court that the particular land stated in the declaration appears, from this special verdict, to lie within the state of Georgia, and that the state of Georgia had power to grant it.

6 Cr. 142.

Some difficulty was produced by the language of the covenant and of the pleadings. It was doubted whether a state can be seized in fee of lands subject to the Indian title, and whether a decision that they were seized in fee might not be construed to amount to a decision that their grantee might maintain an ejectment for them, notwithstanding that title.

The majority of the court is of opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seizin in fee on the part of the state.

Judgment affirmed with costs.

6 Cr. 142.

UNITED STATES *v.* BEVANS.

FEBRUARY TERM, 1818.

[3 Wheaton's Reports, 337–391.]

Bevans was a marine on board the United States ship Independence; and while this ship was lying in Boston harbor, within the limits wherein the process of the courts of Massachusetts had always been served, he killed the cook's mate of said ship. He was tried for this act before the United States circuit court for the district of Massachusetts and found guilty. A motion for a new trial was then made; but the judges of that court being opposed in opinion as to the case being within their jurisdiction, it was brought to the supreme court for decision.

On the 21st of February the chief justice delivered the opinion of the court :—

The question proposed by the circuit court which will be first considered is,—

Whether the offence charged in this indictment was, according to the statement of facts which accompanies the question, "within the jurisdiction or cognizance of the circuit court of the United States for the district of Massachusetts ? "

The indictment appears to be founded on the eighth section of the "act for the punishment of certain crimes against the United States." That section gives the courts of the union cognizance of certain offences committed on the high seas, or in any river, haven, basin, or bay out of the jurisdiction of any particular state.

Whatever may be the constitutional power of congress, it is clear that this power has not been so exercised in this section of the act as to confer on its courts jurisdiction over any offence

committed in a river, haven, basin, or bay, which river, haven, basin, or bay is within the jurisdiction of any particular state.

What, then, is the extent of jurisdiction which a state possesses?

We answer, without hesitation, the jurisdiction of a state is coextensive with its territory; coextensive with its legislative power.

The place described is unquestionably within the original territory of Massachusetts. It is, then, within the jurisdiction of Massachusetts, unless that jurisdiction has been ceded to the United States.

It is contended to have been ceded by that article in the constitution which declares that "the judicial power shall extend to all cases of admiralty and maritime jurisdiction." The argument is, that the power thus granted is exclusive; and that the murder committed by the prisoner is a case of admiralty and maritime jurisdiction.

Let this be admitted. It proves the power of congress to legislate in the case; not that congress has exercised that power. It has been argued, and the argument in favor of, as well as that against the proposition, deserves great consideration, that courts of common law have concurrent jurisdiction with courts of admiralty over murder committed in bays, which are inclosed parts of the sea; and that for this reason the offence is within the jurisdiction of Massachusetts. But in construing the act of congress, the court believes it to be unnecessary to pursue the investigation which has been so well made at the bar respecting the jurisdiction of these rival courts.

To bring the offence within the jurisdiction of the courts of the union, it must have been committed in a river, &c., out of the jurisdiction of any state. It is not the offence committed, but the bay in which it is committed, which must be out of the jurisdiction of the state. If, then, it should be true that Massachusetts can take no cognizance of the offence; yet, unless the place itself be out of her jurisdiction, congress has not given cognizance of that offence to its courts. If there be a common

3 Wh. 387.

jurisdiction, the crime cannot be punished in the courts of the union.

Can the cession of all cases of admiralty and maritime jurisdiction be construed into a cession of the waters on which those cases may arise?

This is a question on which the court is incapable of feeling a doubt. The article which describes the judicial power of the United States is not intended for the cession of territory or of general jurisdiction. It is obviously designed for other purposes. It is in the eighth section of the second article we are to look for cessions of territory and of exclusive jurisdiction. Congress has power to exercise exclusive jurisdiction over this district, and over all places purchased, by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.

It is observable that the power of exclusive legislation (which is jurisdiction) is united with cession of territory, which is to be the free act of the states. It is difficult to compare the two sections together without feeling a conviction, not to be strengthened by any commentary on them, that, in describing the judicial power, the framers of our constitution had not in view any cession of territory, or, which is essentially the same, of general jurisdiction.

It is not questioned that whatever may be necessary to the full and unlimited exercise of admiralty and maritime jurisdiction is in the government of the union. Congress may pass all laws which are necessary and proper for giving the most complete effect to this power. Still, the general jurisdiction over the place, subject to this grant of power, adheres to the territory, as a portion of sovereignty not yet given away. The residuary powers of legislation are still in Massachusetts. Suppose, for example, the power of regulating trade had not been given to the general government. Would this extension of the judicial power to all cases of admiralty and maritime jurisdiction have devested Massachusetts of the power to regulate the trade of her bay? As the powers of the respective govern-

ments now stand, if two citizens of Massachusetts step into shallow water when the tide flows, and fight a duel, are they not within the jurisdiction and punishable by the laws of Massachusetts? If these questions must be answered in the affirmative, and we believe they must, then the bay in which this murder was committed is not out of the jurisdiction of a state, and the circuit court of Massachusetts is not authorized by the section under consideration to take cognizance of the murder which has been committed.

It may be deemed within the scope of the question certified to this court, to inquire whether any other part of the act has given cognizance of this murder to the circuit court of Massachusetts?

The third section enacts, "that if any person or persons shall, within any fort, arsenal, dock-yard, magazine, or in any other place or district of country under the sole and exclusive jurisdiction of the United States, commit the crime of wilful murder, such person or persons, on being thereof convicted, shall suffer death."

Although the bay on which this murder was committed might not be out of the jurisdiction of Massachusetts, the ship of war on the deck of which it was committed is, it has been said, "a *place* under the sole and exclusive jurisdiction of the United States," whose courts may consequently take cognizance of the offence.

That a government, which possesses the broad power of war, which "may provide and maintain a navy," which "may make rules for the government and regulation of the land and naval forces," has power to punish an offence committed by a marine on board a ship of war, wherever that ship may lie, is a proposition never to be questioned in this court. On this section, as on the eighth, the inquiry respects not the extent of the power of congress, but the extent to which that power has been exercised.

The objects with which the word "place" is associated are all, in their nature, fixed and territorial. A fort, an arsenal, a dock-yard, a magazine are all of this character. When the

3 Wh. 390.

sentence proceeds with the words, "or in any other place or district of country under the sole and exclusive jurisdiction of the United States," the construction seems irresistible that by the words "other place" was intended another place of a similar character with those previously enumerated, and with that which follows. Congress might have omitted, in its enumeration, some similar place within its exclusive jurisdiction, which was not comprehended by any of the terms employed, to which some other name might be given; and therefore the words "other place" or "district of country" were added; but the context shows the mind of the legislature to have been fixed on territorial objects of a similar character.

This construction is strengthened by the fact, that, at the time of passing this law, the United States did not possess a single ship of war. It may therefore be reasonably supposed that a provision for the punishment of crimes in the navy might be postponed until some provision for a navy should be made. While taking this view of the subject, it is not entirely unworthy of remark that afterwards, when a navy was created, and congress did proceed to make rules for its regulation and government, no jurisdiction is given to the courts of the United States of any crime committed in a ship of war, wherever it may be stationed. Upon these reasons the court is of opinion that a murder committed on board a ship of war, lying within the harbor of Boston, is not cognizable in the circuit court for the district of Massachusetts; which opinion is to be certified to that court.

The opinion of the court on this point is believed to render it unnecessary to decide the question respecting the jurisdiction of the state court in the case.

3 Wh. 391.

STURGES v. CROWNINSHIELD.

FEBRUARY TERM, 1819.

[4 Wheaton's Reports, 122-208.]

Crowninshield, on the 22d of March, 1811, made two promissory notes to Sturges, due in the following August. On the 3d of April, 1811, the legislature of New York, in which state the notes were given, passed "An act for the benefit of insolvent debtors and their creditors." Crowninshield did not pay his notes, but complied with the act referred to, and obtained a discharge. Sturges sued him before the United States circuit court for the district of Massachusetts, and the judges being opposed in opinion upon the great questions in the case, it was brought before the supreme court, the opinion of which was delivered by Chief Justice Marshall on the 17th of February, 1819.

This case is adjourned from the court of the United States for the first circuit and the district of Massachusetts, on several points, on which the judges of that court were divided, which are stated in the record for the opinion of this court. The first is,—

Whether, since the adoption of the constitution of the United States, any state has authority to pass a bankrupt law, or whether the power is exclusively vested in the congress of the United States?

This question depends on the following clause, in the eighth section of the first article of the constitution of the United States:—

"The congress shall have power," &c., to "establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States."

The counsel for the plaintiff contend that t[illegible]

4 Wh. 191.

power to congress, without limitation, takes it entirely from the several states.

In support of this proposition, they argue that every power given to congress is necessarily supreme; and if, from its nature, or from the words of grant, it is apparently intended to be exclusive, it is as much so as if the states were expressly forbidden to exercise it.

These propositions have been enforced and illustrated by many arguments drawn from different parts of the constitution. That the power is both unlimited and supreme is not questioned. That it is exclusive is denied by the counsel for the defendant.

In considering this question, it must be recollected, that, previous to the formation of the new constitution, we were divided into independent states, united for some purposes, but in most respect sovereign. These states could exercise almost every power, and among others that of passing bankrupt laws. When the American people created a national legislature, with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the states. These powers proceed not from the people of America, but from the people of the several states; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument. In some instances, as in making treaties, we find an express prohibition; and this shows the sense of the convention to have been that a mere grant of a power to congress did not imply a prohibition on the states to exercise the same power. But it has never been supposed that this concurrent power of legislation extended to every possible case in which its exercise by the states has not been expressly prohibited. The confusion resulting from such a practice would be endless. The principle laid down by the counsel for the plantiff, in this respect, is undoubtedly correct. Whenever the terms in which a power is granted to congress, or the nature of the power, require that it should be exercised exclusively by congress, the subject is as completely taken from the state

4 Wh. 193.

legislatures as if they had been expressly forbidden to act on it.

Is the power to estabish uniform laws on the subject of bankruptcies throughout the United States of this description?

The peculiar terms of the grant certainly deserve notice. Congress is not authorized merely to pass laws the operation of which shall be uniform, but to establish uniform laws on the subject throughout the United States. This establishment of uniformity is, perhaps, incompatible with state legislation on that part of the subject to which the acts of congress may extend. But the subject is divisible in its nature into bankrupt and insolvent laws; though the line of partition between them is not so distinctly marked as to enable any person to say, with positive precision, what belongs exclusively to the one, and not to the other class of laws. It is said, for example, that laws which merely liberate the person are insolvent laws, and those which discharge the contract are bankrupt laws. But if an act of congress should discharge the person of the bankrupt, and leave his future acquisitions liable to his creditors, we should feel much hesitation in saying that this was an insolvent, not a bankrupt act; and therefore unconstitutional. Another distinction has been stated, and has been uniformly observed. Insolvent laws operate at the instance of an imprisoned debtor, bankrupt laws at the instance of a creditor. But should an act of congress authorize a commission of bankruptcy to issue on the application of a debtor, a court would scarcely be warranted in saying that the law was unconstitutional, and the commission a nullity.

When laws of each description may be passed by the same legislature, it is unnecessary to draw a precise line between them. The difficulty can arise only in our complex system, where the legislature of the union possesses the power of enacting bankrupt laws; and those of the states, the power of enacting insolvent laws. If it be determined that they are not laws of the same character, but are as distinct as bankrupt laws, and laws which regulate the course of descents, a distinct line

4 Wh. 194.

separation must be drawn, and the power of each government marked with precision. But all perceive that this line must be in a great degree arbitrary. Although the two systems have existed apart from each other, there is such a connection between them as to render it difficult to say how far they may be blended together. The bankrupt law is said to grow out of the exigencies of commerce, and to be applicable solely to traders; but it is not easy to say who must be excluded from, or may be included within, this description. It is, like every other part of the subject, one on which the legislature may exercise an extensive discretion.

This difficulty of discriminating with any accuracy between insolvent and bankrupt laws would lead to the opinion that a bankrupt law may contain those regulations which are generally found in insolvent laws; and that an insolvent law may contain those which are common to a bankrupt law. If this be correct, it is obvious that much inconvenience would result from that construction of the constitution which should deny to the state legislatures the power of acting on this subject, in consequence of the grant to congress. It may be thought more convenient that much of it should be regulated by state legislation, and congress may purposely omit to provide for many cases to which their power extends. It does not appear to be a violent construction of the constitution, and is certainly a convenient one, to consider the power of the states as existing over such cases as the laws of the union may not reach. But be this as it may, the power granted to congress may be exercised or declined, as the wisdom of that body shall decide. If, in the opinion of congress, uniform laws concerning bankruptcies ought not to be established, it does not follow that partial laws may not exist, or that state legislation on the subject must cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the states.

4 Wh. 195.

It has been said that congress has exercised this power; and by doing so has extinguished the power of the states, which cannot be revived by repealing the law of congress.

We do not think so. If the right of the states to pass a bankrupt law is not taken away by the mere grant of that power to congress, it cannot be extinguished; it can only be suspended by the enactment of a general bankrupt law. The repeal of that law cannot, it is true, confer the power on the states; but it removes a disability to its exercise which was created by the act of congress.

Without entering farther into the delicate inquiry respecting the precise limitations which the several grants of power to congress contained in the constitution may impose on the state legislatures, than is necessary for the decision of the question before the court, it is sufficient to say, that, until the power to pass uniform laws on the subject of bankruptcies be exercised by congress, the states are not forbidden to pass a bankrupt law provided it contain no principle which violates the tenth section of the first article of the constitution of the United States.

This opinion renders it totally unnecessary to consider the question, whether the law of New York is, or is not, a bankrupt law.

We proceed to the great question on which the cause must depend. Does the law of New York, which is pleaded in this case, impair the obligation of contracts within the meaning of the constitution of the United States?

This act liberates the person of the debtor, and discharges him from all liability for any debt previously contracted, on his surrendering his property in the manner it prescribes.

In discussing the question, whether a state is prohibited from passing such a law as this, our first inquiry is into the meaning of words in common use. What is the obligation of a contract? and what will impair it?

It would seem difficult to substitute words which are more intelligible, or less liable to misconstruction, than those which

4 Wh. 197.

are to be explained. A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. In the case at bar, the defendant has given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract binds him to pay that sum on that day; and this is its obligation. Any law which releases a part of this obligation must, in the literal sense of the word, impair it. Much more must a law impair it which makes it totally invalid, and entirely discharges it.

The words of the constitution, then, are express, and incapable of being misunderstood. They admit of no variety of construction, and are acknowledged to apply to that species of contract, an engagement between man and man for the payment of money, which has been entered into by these parties. Yet the opinion, that this law is not within the prohibition of the constitution, has been entertained by those who are entitled to great respect, and has been supported by arguments which deserve to be seriously considered.

It has been contended, that, as a contract can only bind a man to pay to the full extent of his property, it is an implied condition that he may be discharged on surrendering the whole of it.

But it is not true that the parties have in view only the property in possession when the contract is formed, or that its obligation does not extend to future acquisitions. Industry, talents, and integrity constitute a fund which is as confidently trusted as property itself. Future acquisitions are therefore liable for contracts ; and to release them from this liability impairs their obligation.

It has been argued that the states are not prohibited from passing bankrupt laws, and that the essential principle of such laws is to discharge the bankrupt from all past obligations; that the states have been in the constant practice of passing insolvent laws, such as that of New York; and if the framers of the constitution had intended to deprive them of this power, insol-

vent laws would have been mentioned in the prohibition; that the prevailing evil of the times, which produced this clause in the constitution, was the practice of emitting paper money, of making property which was useless to the creditor a discharge of his debt, and of changing the time of payment by authorizing distant instalments. Laws of this description, not insolvent laws, constituted, it is said, the mischief to be remedied; and laws of this description, not insolvent laws, are within the true spirit of the prohibition.

The constitution does not grant to the states the power of passing bankrupt laws, or any other power; but finds them in possession of it, and may either prohibit its future exercise entirely, or restrain it so far as national policy may require. It has so far restrained it as to prohibit the passage of any law impairing the obligation of contracts. Although, then, the states may, until that power shall be exercised by congress, pass laws concerning bankrupts; yet they cannot constitutionally introduce into such laws a clause which discharges the obligations the bankrupt has entered into. It is not admitted, that, without this principle, an act cannot be a bankrupt law; and if it were, that admission would not change the constitution, nor exempt such acts from its prohibitions.

The argument drawn from the omission in the constitution to prohibit the states from passing insolvent laws admits of several satisfactory answers. It was not necessary, nor would it have been safe, had it even been the intention of the framers of the constitution to prohibit the passage of all insolvent laws, to enumerate particular subjects to which the principle they intended to establish should apply. The principle was the inviolability of contracts. This principle was to be protected in whatsoever form it might be assailed. To what purpose enumerate the particular modes of violation which should be forbidden, when it was intended to forbid all? Had an enumeration of all the laws which might violate contracts been attempted, the provision must have been less complete and involved in more perplexity that it now is. The plain and simple declaration,

4 Wh. 199.

that no state shall pass any law impairing the obligation of contracts, includes insolvent laws, and all other laws, so far as they infringe the principle the convention intended to hold sacred, and no farther.

But a still more satisfactory answer to this argument is that the convention did not intend to prohibit the passage of all insolvent laws. To punish honest insolvency by imprisonment for life, and to make this a constitutional principle, would be an excess of inhumanity which will not readily be imputed to the illustrious patriots who framed our constitution, nor to the people who adopted it. The distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct. Confinement of the debtor may be a punishment for not performing his contract, or may be allowed as a means of inducing him to perform it. But the state may refuse to inflict this punishment, or may withhold this means, and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner does not impair its obligation. No argument can be fairly drawn from the sixty-first section of the act for establishing a uniform system of bankruptcy, which militates against this reasoning. That section declares that the act shall not be construed to repeal or annul the laws of any state then in force for the relief of insolvent debtors, except so far as may respect persons and cases clearly within its purview; and in such cases it affords its sanction to the relief given by the insolvent laws of the state, if the creditor of the prisoner shall not, within three months, proceed against him as a bankrupt.

The insertion of this section indicates an opinion in congress that insolvent laws might be considered as a branch of the bankrupt system, to be repealed or annulled by any act for establishing that system, although not within its purview. It was for that reason only that a provision against this construction

4 Wh. 201.

could be necessary. The last member of the section adopts the provisions of the state laws, so far as they apply to cases within the purview of the act.

This section certainly attempts no construction of the constitution, nor does it suppose any provision in the insolvent laws impairing the obligation of contracts. It leaves them to operate, so far as constitutionally they may, unaffected by the act of congress, except where that act may apply to individual cases.

The argument which has been pressed most earnestly at the bar is, that, although all legislative acts, which discharge the obligation of a contract without performance, are within the very words of the constitution, yet an insolvent act, containing this principle, is not within its spirit, because such acts have been passed by colonial and state legislatures from the first settlement of the country, and because we know, from the history of the times, that the mind of the convention was directed to other laws, which were fraudulent in their character, which enabled the debtor to escape from his obligation and yet hold his property, not to this, which is beneficial in its operation.

Before discussing this argument, it may not be improper to premise, that, although the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances that a case, for which the words of an instrument expressly provide, shall be exempted from its operation. Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent, unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if in any case the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying

4 Wh. 202.

the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application.

This is certainly not such a case. It is said the colonial and state legislatures have been in the habit of passing laws of this description for more than a century; that they have never been the subject of complaint, and consequently could not be within the view of the general convention.

The fact is too broadly stated. The insolvent laws of many, indeed of by far the greater number, of the states do not contain this principle. They discharge the person of the debtor, but leave his obligation to pay in full force. To this the constitution is not opposed.

But were it even true that this principle had been introduced generally into those laws, it would not justify our varying the construction of the section. Every state in the union, both while a colony and after becoming independent, had been in the practice of issuing paper money; yet this practice is in terms prohibited. If the long exercise of the power to emit bills of credit did not restrain the convention from prohibiting its future exercise, neither can it be said that the long exercise of the power to impair the obligation of contracts should prevent a similar prohibition. It is not admitted that the prohibition is more express in the one case than in the other. It does not, indeed, extend to insolvent laws by name, because it is not a law by name, but a principle, which is to be forbidden; and this principle is described in as appropriate terms as our language affords.

Neither, as we conceive, will any admissible rule of construction justify us in limiting the prohibition under consideration to the particular laws which have been described at the bar, and which furnished such cause for general alarm. What were those laws?

We are told they were such as grew out of the general distress following the war in which our independence was established. To relieve this distress, paper money was issued; worth-

less lands, and other property of no use to the creditor, were made a tender in payment of debts; and the time of payment stipulated in the contract was extended by law. These were the peculiar evils of the day. So much mischief was done, and so much more was apprehended, that general distrust prevailed, and all confidence between man and man was destroyed. To laws of this description, therefore, it is said, the prohibition to pass laws impairing the obligation of contracts ought to be confined.

Let this argument be tried by the words of the section under consideration.

Was this general prohibition intended to prevent paper money? We are not allowed to say so, because it is expressly provided that no state shall "emit bills of credit." Neither could these words be intended to restrain the states from enabling debtors to discharge their debts by the tender of property of no real value to the creditor, because for that subject also particular provision is made. Nothing but gold and silver coin can be made a tender in payment of debts.

It remains to inquire whether the prohibition under consideration could be intended for the single case of a law directing that judgments should be carried into execution by instalments?

This question will scarcely admit of discussion. If this was the only remaining mischief against which the constitution intended to provide, it would undoubtedly have been, like paper money and tender laws, expressly forbidden. At any rate, terms more directly applicable to the subject, more appropriately expressing the intention of the convention, would have been used. It seems scarcely possible to suppose that the framers of the constitution, if intending to prohibit only laws authorizing the payment of debts by instalment, would have expressed that intention by saying, "No state shall pass any law impairing the obligation of contracts." No men would so express such an intention. No men would use terms embracing a whole class of laws, for the purpose of designating a single individual of that class. No court can be justified in restricting such compre-

4 Wh. 205.

hensive words to a particular mischief to which no allusion is made.

The fair and, we think, the necessary construction of the sentence requires that we should give these words their full and obvious meaning. A general dissatisfaction with that lax system of legislation which followed the war of our revolution undoubtedly directed the mind of the convention to this subject. It is probable that laws, such as those which have been stated in argument, produced the loudest complaints, were most immediately felt. The attention of the convention, therefore, was particularly directed to paper money, and to acts which enabled the debtor to discharge his debt otherwise than was stipulated in the contract. Had nothing more been intended, nothing more would have been expressed. But, in the opinion of the convention, much more remained to be done. The same mischief might be effected by other means. To restore public confidence completely, it was necessary not only to prohibit the use of particular means by which it might be effected, but to prohibit the use of any means by which the same mischief might be produced. The convention appears to have intended to establish a great principle, that contracts should be inviolable. The constitution therefore declares that no state shall pass "any law impairing the obligation of contracts."

If, as we think, it must be admitted that this intention might actuate the convention; that it is not only consistent with, but is apparently manifested by, all that part of the section which respects this subject; that the words used are well adapted to the expression of it; that violence would be done to their plain meaning by understanding them in a more limited sense; those rules of construction, which have been consecrated by the wisdom of ages, compel us to say that these words prohibit the passage of any law discharging a contract without performance.

By way of analogy, the statutes of limitations and against usury have been referred to in argument; and it has been supposed that the construction of the constitution which this opinion maintains would apply to them also, and must therefore be too extensive to be correct.

4 Wh. 206.

We do not think so. Statutes of limitations relate to the remedies which are furnished in the courts. They rather establish that certain circumstances shall amount to evidence that a contract has been performed, than dispense with its performance. If, in a state where six years may be pleaded in bar to an action of assumpsit, a law should pass, declaring that contracts already in existence, not barred by the statute, should be construed to be within it, there could be little doubt of its unconstitutionality.

So with respect to the laws against usury. If the law be, that no person shall take more than six per centum per annum for the use of money, and that, if more be reserved, the contract shall be void, a contract made thereafter, reserving seven per cent., would have no obligation in its commencement; but if a law should declare that contracts already entered into, and reserving the legal interest, should be usurious and void, either in the whole or in part, it would impair the obligation of the contract, and would be clearly unconstitutional.

This opinion is confined to the case actually under consideration. It is confined to a case in which a creditor sues in a court, the proceedings of which the legislature, whose act is pleaded, had not a right to control; and to a case where the creditor had not proceeded to execution against the body of his debtor, within the state whose law attempts to absolve a confined insolvent debtor from his obligation. When such a case arises, it will be considered.

It is the opinion of the court that the act of the state of New York which is pleaded by the defendant in this cause, so far as it attempts to discharge this defendant from the debt in the declaration mentioned, is contrary to the constitution of the United States, and that the plea is no bar to the action.

4 Wh. 207.

M'CULLOCH *v.* THE STATE OF MARYLAND AND OTHERS.

FEBRUARY TERM, 1819.

[4 Wheaton's Reports, 316–437.]

In April, 1816, the congress of the United States incorporated the Bank of the United States. In 1817 a branch of this bank was placed at Baltimore, Maryland. In 1818 the legislature of Maryland passed a law to tax "all banks or branches thereof, in the state of Maryland, not chartered by the legislature." The branch of the United States Bank did not pay this tax, and M'Culloch, the cashier, was sued by John James, for himself and the state of Maryland, according to the provisions of the act imposing the tax. Judgment being given in the state courts against M'Culloch, he brought it before the supreme court, the opinion of which was delivered by the chief justice on the 7th of March, 1819.

In the case now to be determined, the defendant, a sovereign state, denies the obligation of a law enacted by the legislature of the union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that state. The constitution of our country, in its most interesting and vital part, is to be considered; the conflicting powers of the government of the union and of its members, as marked in that constitution, are to be discussed; and an opinion given which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal

alone can the decision be made. On the supreme court of the United States has the constitution of our country devolved this important duty.

The first question made in the cause is, Has congress power to incorporate a bank?

It has been truly said that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.

It will not be denied that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this. But it is conceived that a doubtful question,—one on which human reason may pause and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people are to be adjusted,—if not put at rest by the practice of the government, ought to receive a considerable impression from that practice. An exposition of the constitution, deliberately established by legisative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.

The power now contested was exercised by the first congress elected under the present constitution. The bill for incorporating the bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood and was opposed with equal zeal and ability. After being resisted, first in the fair and open field of debate and afterwards in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. The original act was permitted to expire; but a short experience of the embarrassments, to which the refusal to revive it

4 Wh. 401.

exposed the government, convinced those, who were most prejudiced against the measure, of its necessity, and induced the passage of the present law. It would require no ordinary share of intrepidity to assert that a measure adopted under these circumstances was a bold and plain usurpation, to which the constitution gave no countenance.

These observations belong to the cause; but they are not made under the impression, that, were the question entirely new, the law would be found irreconcilable with the constitution.

In discussing this question, the counsel for the state of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent states. The powers of the general government, it has been said, are delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states, who alone possess supreme dominion.

It would be difficult to sustain this proposition. The convention which framed the constitution was indeed elected by the state legislatures. But the instrument, when it came from their hands was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing congress of the United States, with a request that it might "be submitted to a convention of delegates, chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification." This mode of proceeding was adopted; and by the convention, by congress, and by the state legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several states,—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass. Of consequence, when they act, they act in their

4 Wh. 403.

states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments.

From these conventions the constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established" in the name of the people; and is declared to be ordained "in order to form a more perfect union, establish justice, ensure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity." The assent of the states in their sovereign capacity is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived by the state governments. The constitution, when thus adopted, was of complete obligation, and bound the state sovereignties.

It has been said that the people had already surrendered all their powers to the state sovereignties, and had nothing more to give. But surely the question, whether they may resume and modify the powers granted to government, does not remain to be settled in this country. Much more might the legitimacy of the general government be doubted, had it been created by the states. The powers delegated to the state sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves. To the formation of a league, such as was the confederation, the state sovereignties were certainly competent. But when, "in order to form a more perfect union," it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all.

The government of the union, then, (whatever may be the influence of this fact on the case,) is emphatically and truly a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

4 Wh. 404.

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question, respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise as long as our system shall exist.

In discussing these questions, the conflicting powers of the general and state governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.

If any one proposition could command the universal assent of mankind, we might expect it would be this,—that the government of the union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason; the people have in express terms decided it by saying, "This constitution, and the laws of the United States which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the states, shall take the oath of fidelity to it.

The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, "anything in the constitution or laws of any state to the contrary notwithstanding."

Among the enumerated powers we do not find that of establishing a bank, or creating a corporation. But there is no phrase

4 Wh. 405.

in the instrument which, like the articles of confederation, excludes incidental or implied powers, and which requires that everything granted shall be expressly and minutely described. Even the tenth amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the states, are reserved to the states, or to the people;" thus leaving the question, whether the particular power which may become the subject of contest has been delegated to the one government or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the articles of confederation, and probably omitted it to avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature therefore requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the ninth section of the first article, introduced? It is also in some degree warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is a constitution we are expounding.

Although among the enumerated powers of government, we do not find the word "bank" or "incorporation," we find the great powers to lay and collect taxes, to borrow money, to regulate commerce, to declare and conduct a war, and to raise and

4 Wh. 407.

support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended that a government entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depend, must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require that the treasure raised in the north should be transported to the south, that raised in the east conveyed to the west, or that this order should be reversed. Is that construction of the constitution to be preferred which would render these operations difficult, hazardous, and expensive? Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed.

It is not denied that the powers given to the government imply the ordinary means of execution. That, for example, of raising revenue, and applying it to national purposes, is admit-

4 Wh. 408.

ted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. But it is denied that the government has its choice of means, or that it may employ the most convenient means, if to employ them it be necessary to erect a corporation.

On what foundation does this argument rest? On this alone: The power of creating a corporation is one appertaining to sovereignty, and is not expressly conferred on congress. This is true. But all legislative powers appertain to sovereignty. The original power of giving the law on any subject whatever is a sovereign power; and if the government of the union is restrained from creating a corporation, as a means for performing its functions, on the single reason that the creation of a corporation is an act of sovereignty; if the sufficiency of this reason be acknowledged, there would be some difficulty in sustaining the authority of congress to pass other laws for the accomplishment of the same objects.

The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.

The creation of a corporation, it is said, appertains to sovereignty. This is admitted. But to what portion of sovereignty does it appertain? Does it belong to one more than to another? In America the powers of sovereignty are divided between the government of the union and those of the states. They are each sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other. We cannot comprehend that train of reasoning which would maintain that the extent of power granted by the people is to be ascertained not by the nature and terms of the grant, but by its date. Some state constitutions were formed before, some since that of the United States. We cannot be-

4 Wh. 409.

lieve that their relation to each other is in any degree dependent upon this circumstance. Their respective powers must, we think, be precisely the same as if they had been formed at the same time. Had they been formed at the same time, and had the people conferred on the general government the power contained in the constitution, and on the states the whole residuum of power, would it have been asserted that the government of the union was not sovereign with respect to those objects which were entrusted to it, in relation to which its laws were declared to be supreme? If this could not have been asserted, we cannot well comprehend the process of reasoning which maintains that a power appertaining to sovereignty cannot be connected with that vast portion of it which is granted to the general goverment, so far as it is calculated to subserve the legitimate objects of that government. The power of creating a corporation, though appertaining to sovereignty, is not like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but the means by which their objects are accomplished. No contributions are made to charity for the sake of an incorporation, but a corporation is created to administer the charity; no seminary of learning is instituted in order to be incorporated, but the corporate character is conferred to subserve the purposes of education. No city was ever built with the sole object of being incorporated, but is incorporated as affording the best means of being well governed. The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is therefore perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.

But the constitution of the United States has not left the right of congress to employ the necessary means for the execution of the powers conferred on the government to general

4 Wh. 411.

reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department thereof."

The counsel for the state of Maryland have urged various arguments to prove that this clause, though in terms a grant of power, is not so in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers.

In support of this proposition, they have found it necessary to contend that this clause was inserted for the purpose of conferring on congress the power of making laws; that without it doubts might be entertained whether congress could exercise its powers in the form of legislation.

But could this be the object for which it was inserted? A government is created by the people, having legislative, executive, and judicial powers. Its legislative powers are vested in a congress, which is to consist of a senate and house of representatives. Each house may determine the rule of its proceedings; and it is declared that every bill which shall have passed both houses shall, before it becomes a law, be presented to the president of the United States. The seventh section describes the course of proceedings by which a bill shall become a law; and then the eighth section enumerates the powers of congress. Could it be necessary to say that a legislature should exercise legislative powers in the shape of legislation? After allowing each house to prescribe its own course of proceeding, after describing the manner in which a bill should become a law, would it have entered into the mind of a single member of the convention that an express power to make laws was necessary to enable the legislature to make them? That a legislature endowed with legislative powers can legislate, is a proposition too self-evident to have been questioned.

But the argument on which most reliance is placed is drawn from the peculiar language of this clause. Congress is not em-

4 Wh. 412.

powered by it to make all laws which may have relation to the powers conferred on the government, but such only as may be "necessary and proper" for carrying them into execution. The word "necessary" is considered as controlling the whole sentence, and as limiting the right to pass laws, for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory; that it excludes the choice of means, and leaves to congress, in each case, that only which is most direct and simple.

Is it true that this is the sense in which the word "necessary" is always used? Does it always import an absolute, physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end is generally understood as employing any means calculated to produce the end, and not as being confined to those single means without which the end would be entirely unattainable. Such is the character of human language that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction that many words which import something excessive should be understood in a more mitigated sense,—in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases. This comment on the word is well illustrated by the passage cited

at the bar from the tenth section of the first article of the constitution. It is, we think, impossible to compare the sentence, which prohibits a state from laying "imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," with that which authorizes congress "to make all laws which shall be necessary and proper for carrying into execution" the powers of the general government, without feeling a conviction that the convention understood itself to change materially the meaning of the word "necessary," by prefixing the word "absolutely." This word, then, like others, is used in various senses; and in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of congress to adopt any which might be appropriate and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should in all future time execute its powers would have been to change entirely the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the government, we shall

4 Wh. 415.

find it so pernicious in its operation that we shall be compelled to discard it. The powers vested in congress may certainly be carried into execution without prescribing an oath of office. The power to exact this security for the faithful performance of duty is not given, nor is it indispensably necessary. The different departments may be established, taxes may be imposed and collected, armies and navies may be raised and maintained, and money may be borrowed, without requiring an oath of office. It might be argued, with as much plausibility as other incidental powers have been assailed, that the convention was not unmindful of this subject. The oath which might be exacted,—that of fidelity to the constitution,—is prescribed, and no other can be required. Yet he would be charged with insanity who should contend that the legislature might not superadd to the oath directed by the constitution such other oath of office as its wisdom might suggest.

So with respect to the whole penal code of the United States; whence arises the power to punish in cases not prescribed by the constitution? All admit that the government may legitimately punish any violation of its laws; and yet this is not among the enumerated powers of congress. The right to enforce the observance of law, by punishing its infraction, might be denied with the more plausibility, because it is expressly given in some cases. Congress is empowered "to provide for the punishment of counterfeiting the securities and current coin of the United States," and "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations." The several powers of congress may exist, in a very imperfect state to be sure, but they may exist and be carried into execution, although no punishment should be inflicted in cases where the right to punish is not expressly given.

Take, for example, the power "to establish post-offices and post-roads." This power is executed by the single act of making the establishment. But from this has been inferred the power and duty of carrying the mail along the post-road, from one post-office to another. And from this implied power has

4 Wh. 416.

again been inferred the right to punish those who steal letters from the post-office, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post-office and post-road. This right is, indeed, essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So of the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court. To punish these offences is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment.

The baneful influence of this narrow construction on all the operations of the government, and the absolute impracticability of maintaining it without rendering the government incompetent to its great objects, might be illustrated by numerous examples drawn from the constitution and from our laws. The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. It is a right incidental to the power, and conducive to its beneficial exercise.

If this limited construction of the word "necessary" must be abandoned in order to punish, whence is derived the rule which would reinstate it, when the government would carry its powers into execution by means not vindictive in their nature? If the word "necessary" means "needful," "requisite," "essential," "conducive to," in order to let in the power of punishment for the infraction of law, why is it not equally comprehensive when required to authorize the use of means which facilitate the execution of the powers of government without the infliction of punishment?

In ascertaining the sense in which the word "necessary" is used in this clause of the constitution, we may derive some aid

4 Wh. 418.

from that with which it is associated. Congress shall have power "to make all laws which shall be necessary and proper to carry into execution" the powers of the government. If the word "necessary" was used in that strict and rigorous sense for which the counsel for the state of Maryland contend, it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word, the only possible effect of which is to qualify that strict and rigorous meaning; to present to the mind the idea of some choice of means of legislation not straitened and compressed within the narrow limits for which gentlemen contend.

But the argument, which most conclusively demonstrates the error of the construction contended for by the counsel for the state of Maryland, is founded on the intention of the convention, as manifested in the whole clause. To waste time and argument in proving that, without it, congress might carry its powers into execution, would be not much less idle than to hold a lighted taper to the sun. As little can it be required to prove, that, in the absence of this clause, congress would have some choice of means; that it might employ those which in its judgment would most advantageously effect the object to be accomplished; that any means adapted to the end, any means which tended directly to the execution of the constitutional powers of the government, were in themselves constitutional. This clause, as construed by the state of Maryland, would abridge and almost annihilate this useful and necessary right of the legislature to select its means. That this could not be intended is, we should think, had it not been already controverted, too apparent for controversy. We think so for the following reasons :—

1st. The clause is placed among the powers of congress, not among the limitations on those powers.

2d. Its terms purport to enlarge, not to diminish, the powers vested in the government. It purports to be an additional power, not a restriction on those already granted. No reason has been or can be assigned for thus concealing an intention to narrow

the discretion of the national legislature under words which purport to enlarge it. The framers of the constitution wished its adoption, and well knew that it would be endangered by its strength, not by its weakness. Had they been capable of using language which would convey to the eye one idea, and, after deep reflection, impress on the mind another, they would rather have disguised the grant of power than its limitation. If, then, their intention had been by this clause to restrain the free use of means which might otherwise have been implied, that intention would have been inserted in another place, and would have been expressed in terms resembling these : "In carrying into execution the foregoing powers, and all others," &c., "no laws shall be passed but such as are necessary and proper." Had the intention been to make this clause restrictive, it would unquestionably have been so in form as well as in effect.

The result of the most careful and attentive consideration bestowed upon this clause is, that, if it does not enlarge, it cannot be construed to restrain, the powers of congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the constitution, if that instrument be not a splendid bauble.

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means, which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

4 Wh. 420.

That a corporation must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification, than other means, has been sufficiently proved. If we look to the origin of corporations, to the manner in which they have been framed in that government from which we have derived most of our legal principles and ideas, or to the uses to which they have been applied, we find no reason to suppose that a constitution, omitting, and wisely omitting, to enumerate all the means for carrying into execution the great powers vested in government, ought to have specified this. Had it been intended to grant this power as one which should be distinct and independent, to be exercised in any case whatever, it would have found a place among the enumerated powers of the government. But being considered merely as a means, to be employed only for the purpose of carrying into execution the given powers, there could be no motive for particularly mentioning it.

The propriety of this remark would seem to be generally acknowledged by the universal acquiescence in the construction which has been uniformly put on the third section of the fourth article of the constitution. The power to "make all needful rules and regulations respecting the territory or other property belonging to the United States" is not more comprehensive than the power "to make all laws which shall be necessary and proper for carrying into execution" the powers of the government. Yet all admit the constitutionality of a territorial government, which is a corporate body.

If a corporation may be employed indiscriminately with other means to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one must be within the discretion of congress, if it be an appropriate mode of executing the powers of government. That it is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations is not now a subject of controversy. All those who have been concerned in the administration of our finances have concurred in representing its importance and necessity; and so strongly have they been felt, that statesmen

4 Wh. 422.

of the first class, whose previous opinions against it had been confirmed by every circumstance which can fix the human judgment, have yielded those opinions to the exigencies of the nation. Under the confederation, congress, justifying the measure by its necessity, transcended, perhaps, its powers, to obtain the advantage of a bank; and our own legislation attests the universal conviction of the utility of this measure. The time has passed away when it can be necessary to enter into any discussion in order to prove the importance of this instrument, as a means to effect the legitimate objects of the government.

But were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place. Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution, or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretentions to such a power.

After this declaration it can scarcely be necessary to say that the existence of state banks can have no possible influence on the question. No trace is to be found in the constitution of an intention to create a dependence of the government of the union on those of the states, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the re-

4 Wh. 423.

sult of its measures uncertain, and create a dependence on other governments which might disappoint its most important designs, and is incompatible with the language of the constitution. But were it otherwise, the choice of means implies a right to choose a national bank in preference to state banks, and congress alone can make the election.

After the most deliberate consideration, it is the unanimous and decided opinion of this court that the act to incorporate the Bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land.

The branches, proceeding from the same stock, and being conducive to the complete accomplishment of the object, are equally constitutional. It would have been unwise to locate them in the charter, and it would be unnecessarily inconvenient to employ the legislative power in making those subordinate arrangements. The great duties of the bank are prescribed; those duties require branches; and the bank itself may, we think, be safely trusted with the selection of places where those branches shall be fixed; reserving always to the government the right to require that a branch shall be located where it may be deemed necessary.

It being the opinion of the court that the act incorporating the bank is constitutional, and that the power of establishing a branch in the state of Maryland might be properly exercised by the bank itself, we proceed to inquire—

2. Whether the state of Maryland may, without violating the constitution, tax that branch?

That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the union; that it is to be concurrently exercised by the two governments; are truths which have never been denied. But such is the paramount character of the constitution that its capacity to withdraw any subject from the action of even this power is admitted. The states are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for

4 Wh. 424.

executing their inspection laws. If the obligation of this prohibition must be conceded,—if it may restrain a state from the exercise of its taxing power on imports and exports—the same paramount character would seem to restrain, as it certainly may restrain, a state from such other exercise of this power as is in its nature incompatible with and repugnant to the constitutional laws of the union. A law absolutely repugnant to another as entirely repeals that other as if express terms of repeal were used.

On this ground the counsel for the bank place its claim to be exempted from the power of a state to tax its operations. There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it without rending it into shreds.

This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. That a power to create implies a power to preserve. 2d. That a power to destroy, if wielded by a different hand, is hostile to and incompatible with these powers to create and to preserve. 3d. That, where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.

These propositions, as abstract truths, would, perhaps, never be controverted. Their application to this case, however, has been denied; and both in maintaining the affirmative and the negative, a splendor of eloquence, and strength of argument, seldom, if ever, surpassed, have been displayed.

The power of congress to create, and of course to continue,

4 Wh. 426.

the bank, was the subject of the preceding part of this opinion, and is no longer to be considered as questionable.

That the power of taxing it by the states may be exercised so as to destroy it is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and like sovereign power of every other description, is trusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the state, in the article of taxation itself, is subordinate to and may be controlled by the constitution of the United States. How far it has been controlled by that instrument must be a question of construction. In making this construction no principle not declared can be admissible which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments as to exempt its own operations from their influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the constitution.

The argument on the part of the state of Maryland is, not that the states may directly resist a law of congress, but that they may exercise their acknowledged powers upon it, and that the constitution leaves them this right in the confidence that they will not abuse it.

Before we proceed to examine this argument, and to subject it to the test of the constitution, we must be permitted to bestow a few considerations on the nature and extent of this original right of taxation which is acknowledged to remain with the states. It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of

this power is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation.

The people of a state, therefore, give to their government a right of taxing themselves and their property; and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse. But the means employed by the government of the union have no such security, nor is the right of a state to tax them sustained by the same theory. Those means are not given by the people of a particular state, not given by the constituents of the legislature which claim the right to tax them, but by the people of all the states. They are given by all, for the benefit of all, and upon theory should be subjected to that government only which belongs to all.

It may be objected to this definition that the power of taxation is not confined to the people and property of a state. It may be exercised upon every object brought within its jurisdiction.

This is true. But to what source do we trace this right? It is obvious that it is an incident of sovereignty, and is coextensive with that to which it is an incident. All subjects over which the sovereign power of a state extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.

The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single state. They are given by the people of the United

4 Wh. 428.

States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently the people of a single state cannot confer a sovereignty which will extend over them.

If we measure the power of taxation residing in a state by the extent of sovereignty which the people of a single state possess and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a state unimpaired; which leaves to a state the command of all its resources; and which places beyond its reach all those powers which are conferred by the people of the United States on the government of the union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the states, and safe for the union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse, of the power? The attempt to use it on the means employed by the government of the union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give.

We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the union for the execution of its powers. The right never existed, and the question, whether it has been surrendered, cannot arise.

But, waiving this theory for the present, let us resume the inquiry, whether this power can be exercised by the respective states, consistently with a fair construction of the constitution.

4 Wh. 430.

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word CONFIDENCE. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which would banish that confidence which is essential to all government.

But is this a case of confidence? Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose that the people of any one state should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the union alone are all represented. The legislature of the union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it as it really is.

If we apply the principle for which the state of Maryland contends to the constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the states. The American people have declared their constitution, and the laws made in pursuance thereof, shall be supreme; but this principle would transfer the supremacy, in fact, to the states.

If the states may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax

4 Wh. 431.

the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the states.

Gentlemen say they do not claim the right to extend state taxation to these objects. They limit their pretensions to property. But on what principle is this distinction made? Those who make it have furnished no reason for it, and the principle for which they contend denies it. They contend that the power of taxation has no other limit than is found in the tenth section of the first article of the constitution; that with respect to everything else the power of the states is supreme, and admits of no control. If this be true, the distinction between property and other subjects to which the power of taxation is applicable is merely arbitrary, and can never be sustained. This is not all. If the controlling power of the states be established; if their supremacy as to taxation be acknowledged; what is to restrain their exercising this control in any shape they may please to give it? Their sovereignty is not confined to taxation. That is not the only mode in which it might be displayed. The question is, in truth, a question of supremacy; and if the right of the states to tax the means employed by the general government be conceded, the declaration, that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation.

In the course of the argument "The Federalist" has been quoted; and the opinions expressed by the authors of that work have been justly supposed to be entitled to great respect in expounding the constitution. No tribute can be paid to them which exceeds their merit. But in applying their opinions to the cases which may arise in the progress of our government, a right to judge of their correctness must be retained; and to understand the argument, we must examine the proposition it maintains, and the objections against which it is directed. The

4 Wh. 432.

subject of those numbers from which passages have been cited is the unlimited power of taxation which is vested in the general government. The objection to this unlimited power, which the argument seeks to remove, it stated with fulness and clearness. It is, "that an indefinite power of taxation in the latter (the government of the union) might, and probably would in time, deprive the former (the government of the states) of the means of providing for their own necessities, and would subject them entirely to the mercy of the national legislature. As the laws of the union are to become the supreme law of the land; as it is to have power to pass all laws that may be necessary for carrying into execution the authorities with which it is proposed to vest it; the national government might at any time abolish the taxes imposed for state objects, upon the pretence of an interference with its own. It might allege a necessity for doing this, in order to give efficacy to the national revenues; and thus all the resources of taxation might, by degrees, become the subjects of federal monopoly, to the entire exclusion and destruction of the state governments."

The objections to the constitution which are noticed in these numbers were to the undefined power of the government to tax, not to the incidental privilege of exempting its own measures from state taxation. The consequences apprehended from this undefined power were that it would absorb all the objects of taxation, "to the exclusion and destruction of the state governments." The arguments of "The Federalist" are intended to prove the fallacy of these apprehensions; not to prove that the government was incapable of executing any of its powers, without exposing the means it employed to the embarrassments of state taxation. Arguments urged against these objections and these apprehensions are to be understood as relating to the points they mean to prove. Had the authors of those excellent essays been asked whether they contended for that construction of the constitution which would place within the reach of the states those measures which the government might adopt for the execution of its powers, no man who has read their instruc-

4 Wh. 434.

tive pages will hesitate to admit that their answer must have been in the negative.

It has also been insisted, that, as the power of taxation in the general and state governments is acknowledged to be concurrent, every argument, which would sustain the right of the general government to tax banks chartered by the states, will equally sustain the right of the states to tax banks chartered by the general government.

But the two cases are not on the same reason. The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in congress, and by their representatives exercise this power. When they tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others, as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole,—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme.

But if the full application of this argument could be admitted, it might bring into question the right of congress to tax the state banks, and could not prove the right of the state to tax the Bank of the United States.

The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government. This is, we think, the una-

4 Wh. 435.

voidable consequence of that supremacy which the constitution has declared.

We are unanimously of opinion that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. But this is a tax on the operations of the bank, and is consequently a tax on the operation of an instrument employed by the government of the union to carry its powers into execution. Such a tax must be unconstitutional.

4 Wh. 436.

TRUSTEES OF DARTMOUTH COLLEGE *v.* WOODWARD.

FEBRUARY TERM, 1819.

[4 Wheaton's Reports, 518–715.]

In 1769 the king of Great Britain granted a charter to Dartmouth College in the province of New Hampshire. This was done upon the representation that property would be given said college, if chartered ; and when charted, property was so given. Under this charter the college went on, governed by trustees appointed in accordance with it, until 1816, when the legislature of the state of New Hampshire passed three acts to amend this charter ; which amendment the trustees would not accept. Woodward was secretary and treasurer of the college under the old charter ; but was removed from his place as secretary in August, 1816, and from that of treasurer in September, 1816. In February, 1817, the new board of trustees was organized under the acts of 1816, and Woodward was appointed secretary and treasurer of the new board. He, as an officer under the old board, held the charter and other chattels of the college, and these he refused to give up. The old trustees sued him for these chattels, and judgment being given against them in the state courts, they now brought it to the supreme court.

On the 2d of February, 1819, the opinion of the court was delivered by Chief Justice Marshall, as follows :—

This is an action of trover brought by the trustees of Dartmouth college against William H. Woodward, in the state court of New Hampshire, for the book of records, corporate seal, and other corporate property, to which the plaintiffs allege themselves to be entitled.

A special verdict, after setting out the rights of the parties,

finds for the defendant, if certain acts of the legislature of New Hampshire passed on the 27th of June, and on the 18th of December, 1816, be valid and binding on the trustees without their assent, and not repugnant to the constitution of the United States; otherwise it finds for the plaintiffs.

The superior court of judicature of New Hampshire rendered a judgment upon this verdict for the defendant, which judgment has been brought before this court by writ of error. The single question now to be considered is, Do the acts to which the verdict refers violate the constitution of the United States?

This court can be insensible neither to the magnitude nor delicacy of this question. The validity of a legislative act is to be examined; and the opinion of the highest law tribunal of a state is to be revised; an opinion which carries with it intrinsic evidence of the diligence, of the ability, and the integrity with which it was formed. On more than one occasion this court has expressed the cautious circumspection with which it approaches the consideration of such questions; and has declared that in no doubtful case would it pronounce a legislative act to be contrary to the constitution. But the American people have said, in the constitution of the United States, that "No state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." In the same instrument they have also said, "That the judicial power shall extend to all cases in law and equity arising under the constitution." On the judges of this court, then, is imposed the high and solemn duty of protecting, from even legislative violation, those contracts which the constitution of our country has placed beyond legislative control; and however irksome the task may be, this is a duty from which we dare not shrink.

The title of the plaintiffs originates in a charter dated the 13th day of December, in the year 1769, incorporating twelve persons therein mentioned, by the name of "The Trustees of Dartmouth College," granting to them and their successors the usual corporate privileges and powers, and authorizing the

4 Wh. 625.

trustees, who are to govern the college, to fill up all vacancies which may be created in their own body.

The defendant claims under three acts of the legislature of New Hampshire, the most material of which was passed on the 27th of June, 1816, and is entitled, "An act to amend the charter, and enlarge and improve the corporation, of Dartmouth College." Among other alterations in the charter, this act increases the number of trustees to twenty-one, gives the appointment of the additional members to the executive of the state, and creates a board of overseers, with power to inspect and control the most important acts of the trustees. This board consists of twenty-five persons. The president of the senate, the speaker of the house of representatives of New Hampshire, and the governor and lieutenant-governor of Vermont, for the time being, are to be members *ex officio*. The board is to be completed by the governor and council of New Hampshire, who are also empowered to fill all vacancies which may occur. The acts of the 18th and 26th of December are supplemental to that of the 27th of June, and are principally intended to carry that act into effect.

The majority of the trustees of the college have refused to accept this amended charter, and have brought this suit for the corporate property, which is in possession of a person holding by virtue of the acts which have been stated.

It can require no argument to prove that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. In the application it is stated that large contributions have been made for the object, which will be conferred on the corporation as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely in this transaction, every ingredient of a complete and legitimate contract is to be found.

The points for consideration are,—

1. Is this contract protected by the constitution of the United States?

2. Is it impaired by the acts under which the defendant holds?

1. On the first point it has been argued that the word "contract" in its broadest sense would comprehend the political relations between the government and its citizens, would extend to offices held within a state for state purposes, and to many of those laws concerning civil institutions, which must change with circumstances, and be modified by ordinary legislation, which deeply concern the public, and which, to preserve good government, the public judgment must control. That even marriage is a contract, and its obligations are effected by the laws respecting divorces. That the clause in the constitution, if construed in its greatest latitude, would prohibit these laws. Taken in its broad unlimited sense the clause would be an unprofitable and vexatious interference with the internal concerns of a state, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions which are established for purposes of internal government, and which, to subserve those purposes, ought to vary with varying circumstances. That, as the framers of the constitution could never have intended to insert in that instrument a provision so unnecessary, so mischievous, and so repugnant to its general spirit, the term "contract" must be understood in a more limited sense. That it must be understood as intended to guard against a power of at least doubtful utility, the abuse of which had been extensively felt; and to restrain the legislature in future from violating the right to property. That, anterior to the formation of the constitution, a course of legislation had prevailed in many, if not in all of the states, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements. To correct this mischief, by restraining the power which produced it, the state legislatures were forbidden "to pass any law impairing the obligation of contracts," that is, of contracts respecting property, under which some individual could claim a right to something beneficial to himself; and that, since the clause

4 Wh. 628.

in the constitution must in construction receive some limitation, it may be confined, and ought to be confined, to cases of this description, to cases within the mischief it was intended to remedy.

The general correctness of these observations cannot be controverted. That the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted. The provision of the constitution never has been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces. Those acts enable some tribunal, not to impair a marriage contract, but to liberate one of the parties, because it has been broken by the other. When any state legislature shall pass an act annulling all marriage contracts, or allowing either party to annul it without the consent of the other, it will be time enough to inquire whether such an act be constitutional.

The parties in this case differ less on general principles, less on the true construction of the constitution in the abstract, than on the application of those principles to this case, and on the true construction of the charter of 1769. This is the point on which the cause essentially depends. If the act of incorporation be a grant of political power, if it create a civil institution, to be employed in the administration of the government, or if the funds of the college be public property, or if the state of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the state may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States.

But if this be a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals, on the

4 Wh. 629.

faith of the charter; if the donors have stipulated for the future disposition and management of those funds in the manner prescribed by themselves; there may be more difficulty in the case, although neither the persons who have made these stipulations, nor those for whose benefit they were made, should be parties to the cause. Those who are no longer interested in the property may yet retain such an interest in the preservation of their own arrangements as to have a right to insist that those arrangements shall be held sacred. Or if they have themselves disappeared, it becomes a subject of serious and anxious inquiry, whether those whom they have legally empowered to represent them forever may not assert all the rights which they possess while in being; whether, if they be without personal representatives who may feel injured by a violation of the compact, the trustees be not so completely their representatives in the eye of the law as to stand in their place, not only as respects the government of the college, but also as respects the maintenance of the college charter.

It becomes, then, the duty of the court most seriously to examine this charter and to ascertain its true character.

From the instrument itself it appears, that, about the year 1754, the Rev. Eleazer Wheelock established, at his own expense, and on his own estate, a charity school for the instruction of Indians in the Christian religion. The success of this institution inspired him with the design of soliciting contributions in England for carrying on and extending his undertaking. In this pious work he employed the Rev. Nathaniel Whitaker, who, by virtue of a power of attorney from Dr. Wheelock, appointed the Earl of Dartmouth and others trustees of the money which had been and should be contributed; which appointment Dr. Wheelock confirmed by a deed of trust authorizing the trustees to fix on a site for the college. They determined to establish the school on Connecticut river, in the western part of New Hampshire; that situation being supposed favorable for carrying on the original design among the Indians, and also for promoting learning among the English; and the proprietors in the

4 Wh. 630.

neighborhood having made large offers of land on condition that the college should there be placed. Dr. Wheelock then applied to the crown for an act of incorporation, and represented the expediency of appointing those, whom he had by his last will named as trustees in America, to be members of the proposed corporation. In consideration of the premises, "for the education and instruction of youth of the Indian tribes," &c., "and also of English youth, and any others," the charter was granted, and the trustees of Dartmouth College were by that name created a body corporate, with power, for the use of the said college, to acquire real and personal property, and to pay the president, tutors, and other officers of the college, such salaries as they shall allow.

The charter proceeds to appoint Eleazer Wheelock, "the founder of said college," president thereof, with power by his last will to appoint a successor, who is to continue in office until disapproved by the trustees. In case of vacancy, the trustees may appoint a president, and in case of the ceasing of a president, the senior professor or tutor, being one of the trustees, shall exercise the office, until an appointment shall be made. The trustees have power to appoint and displace professors, tutors, and other officers, and to supply any vacancies which may be created in their own body by death, resignation, removal, or disability; and also to make ordinances, orders, and laws, for the government of the college, the same not being repugnant to the laws of Great Britain, or of New Hampshire, and not excluding any person on account of his speculative sentiments in religion, or his being of a religious profession different from that of the trustees.

This charter was accepted, and the property both real and personal, which had been contributed for the benefit of the college, was conveyed to and vested in the corporate body.

From this brief review of the most essential parts of the charter it is apparent that the funds of the college consisted entirely of private donations. It is, perhaps, not very important who were the donors. The probability is that the Earl of Dartmouth

4 Wh. 632.

and the other trustees in England were in fact the largest contributors. Yet the legal conclusion from the facts recited in the charter would probably be that Dr. Wheelock was the founder of the college.

The origin of the institution was undoubtedly the Indian charity school established by Dr. Wheelock at his own expense. It was at his instance, and to enlarge this school, that contributions were solicited in England. The person soliciting these contributions was his agent; and the trustees who received the money were appointed by, and act under, his authority. It is not too much to say that the funds were obtained by him in trust, to be applied by him to the purposes of his enlarged school. The charter of incorporation was granted at his instance. The persons named by him in his last will, as the trustees of his charity school, compose a part of the corporation. And he is declared to be the founder of the college and its president for life. Were the inquiry material, we should feel some hesitation in saying that Dr. Wheelock was not in law to be considered as the founder* of this institution, and as possessing all the rights appertaining to that character. But be this as it may, Dartmouth College is really endowed by private individuals, who have bestowed their funds for the propagation of the Christian religion among the Indians, and for the promotion of piety and learning generally. From these funds the salaries of the tutors are drawn; and these salaries lessen the expense of education to the students. It is, then, an eleemosynary,† and as far as respects its funds, a private corporation.

Do its objects stamp on it a different character? Are the trustees and professors public officers, invested with any portion of political power, partaking in any degree in the administration of civil government, and performing duties which flow from the sovereign authority?

That education is an object of national concern, and a proper subject of legislation, all admit. That there may be an institution founded by government, and placed entirely under its imme-

* 1 Bl. Com. 481. † Ibid. 471.

diate control, the officers of which would be public officers, amenable exclusively to government, none will deny. But is Dartmouth College such an institution? Is education altogether in the hands of government? Does every teacher of youth become a public officer? And do donations for the purpose of education necessarily become public property, so far that the will of the legislature, not the will of the donor, becomes the law of the donation? These questions are of serious moment to society, and deserve to be well considered.

Dr. Wheelock, as the keeper of his charity school, instructing the Indians in the art of reading and in our holy religion, sustaining them at his own expense and on the voluntary contributions of the charitable, could scarcely be considered as a public officer, exercising any portion of those duties which belong to government; nor could the legislature have supposed that his private funds, or those given by others, were subject to legislative management, because they were applied to the purposes of education. When, afterwards, his school was enlarged, and the liberal contributions made in England and in America enabled him to extend his cares to the education of the youth of his own country, no change was wrought in his own character, or in the nature of his duties. Had he employed assistant tutors with the funds, contributed by others, or had the trustees in England established a school with Dr. Wheelock at its head, and paid salaries to him and his assistants, they would still have been private tutors; and the fact that they were employed in the education of youth could not have converted them into public officers, concerned in the administration of public duties, or have given the legislature a right to interfere in the management of the fund. The trustees, in whose care that fund was placed by the contributors, would have been permitted to execute their trust uncontrolled by legislative authority.

Whence, then, can be derived the idea that Dartmouth College has become a public institution, and its trustees public officers, exercising powers conferred by the public for public objects? Not from the source whence its funds were drawn; for its foun-

4 Wh. 635.

dation is purely private and eleemosynary. Not from the application of those funds; for money may be given for education, and the persons receiving it do not, by being employed in the education of youth, become members of the civil government. Is it from the act of incorporation? Let this subject be considered.

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being. But this being does not share in the civil government of the country, unless that be the purpose for which it was created. Its immortality no more confers on it political power, or a political character, than immortality would confer such power or character on a natural person. It is no more a state instrument than a natural person exercising the same powers would be. If, then, a natural person, employed by individuals in the education of youth, or for the government of a seminary in which youth is educated, would not become a public officer, or be considered as a member of the civil government, how is it that this artificial being, created by law for the purpose of being employed by the same individuals for the same purposes, should become a part of the

4 Wh. 636.

civil government of the country? Is it because its existence, its capacities, its powers, are given by law? Because the government has given it the power to take and to hold property in a particular form, and for particular purposes, has the government a consequent right substantially to change that form, or to vary the purposes to which the property is to be applied? This principle has never been asserted or recognized, and is supported by no authority. Can it derive aid from reason?

The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and, in most cases, the sole consideration, of the grant. In most eleemosynary institutions the object would be difficult, perhaps unattainable, without the aid of a charter of incorporation. Charitable or public-spirited individuals, desirous of making permanent appropriations for charitable or other useful purposes, find it impossible to effect their design securely and certainly without an incorporating act. They apply to the government, state their beneficent object, and offer to advance the money necessary for its accomplishment, provided the government will confer on the instrument which is to execute their designs the capacity to execute them. The proposition is considered and approved. The benefit to the public is considered as an ample compensation for the faculty it confers, and the corporation is created. If the advantages to the public constitute a full compensation for the faculty it gives, there can be no reason for exacting a further compensation, by claiming a right to exercise over this artificial being a power which changes its nature, and touches the fund for the security and application of which it was created. There can be no reason for implying in a charter, given for a valuable consideration, a power which is not only not expressed, but is in direct contradiction to its express stipulations.

From the fact, then, that a charter of incorporation has been granted, nothing can be inferred which changes the character of the institution, or transfers to the government any new power

4 Wh. 637.

over it. The character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed, and the objects for which they are created. The right to change them is not founded on their being incorporated, but on their being the instruments of government, created for its purposes. The same institutions, created for the same objects, though not incorporated, would be public institutions, and, of course, be controllable by the legislature. The incorporating act neither gives nor prevents this control. Neither in reason can the incorporating act change the character of a private eleemosynary institution.

We are next led to the inquiry, for whose benefit the property given to Dartmouth College was secured. The counsel for the defendant have insisted that the beneficial interest is in the people of New Hampshire. The charter, after reciting the preliminary measures which had been taken, and the application for an act of incorporation, proceeds thus: "Know ye, therefore, that we, considering the premises, and being willing to encourage the laudable and charitable design of spreading Christian knowledge among the savages of our American wilderness, and also, that the best means of education be established in our province of New Hampshire, for the benefit of said province, do, of our special grace," &c. Do these expressions bestow on New Hampshire any exclusive right to the property of the college, any exclusive interest in the labors of the professors? Or do they merely indicate a willingness that New Hampshire should enjoy those advantages which result to all from the establishment of a seminary of learning in the neighborhood? On this point we think it impossible to entertain a serious doubt. The words themselves, unexplained by the context, indicate that the benefit intended for the province is that which is derived from establishing the best means of education therein; that is, from establishing in the province Dartmouth College, as constituted by the charter. But if these words considered alone could admit of doubt, that doubt is completely removed by an inspection of the entire instrument.

4 Wh. 639.

The particular interests of New Hampshire never entered into the mind of the donors, never constituted a motive for their donation. The propagation of the Christian religion among the savages, and the dissemination of useful knowledge among the youth of the country, were the avowed and the sole objects of their contributions. In these New Hampshire would participate; but nothing particular or exclusive was intended for her. Even the site of the college was selected, not for the sake of New Hampshire, but because it was "most subservient to the great end in view," and because liberal donations of land were offered by the proprietors, on condition that the institution should be there established. The real advantages from the location of the college are, perhaps, not less considerable to those on the west than to those on the east side of Connecticut river. The clause which constitutes the incorporation, and expresses the objects for which it was made, declares those objects to be the instruction of the Indians, "and also of English youth, and any others." So that the objects of the contributors, and the incorporating act, were the same; the promotion of Christianity, and of education generally, not the interests of New Hampshire particularly.

From this review of the charter it appears that Dartmouth College is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors to the specified objects of that bounty; that its trustees or governors were originally named by the founder, and invested with the power of perpetuating themselves; that they are not public officers, nor is it a civil institution, participating in the administration of government; but a charity school, or a seminary of education, incorporated for the preservation of its property, and the perpetual application of that property to the objects of its creation.

Yet a question remains to be considered, of more real difficulty, on which more doubt has been entertained than on all that have been discussed. The founders of the college, at least those whose contributions were in money, have parted

4 Wh. 640.

with the property bestowed upon it, and their representatives have no interest in that property. The donors of land are equally without interest, so long as the corporation shall exist. Could they be found, they are unaffected by any alteration in its constitution, and probably regardless of its form, or even of its existence. The students are fluctuating, and no individual among our youth has a vested interest in the institution which can be asserted in a court of justice. Neither the founders of the college, nor the youth for whose benefit it was founded, complain of the alteration made in its charter, or think themselves injured by it. The trustees alone complain, and the trustees have no beneficial interest to be protected. Can this be such a contract as the constitution intended to withdraw from the power of state legislation? Contracts, the parties to which have a vested beneficial interest, and those only, it has been said, are the objects about which the constitution is solicitous, and to which its protection is extended.

The court has bestowed on this argument the most deliberate consideration, and the result will be stated. Dr. Wheelock, acting for himself, and for those who, at his solicitation, had made contributions to his school, applied for this charter, as the instrument which should enable him and them to perpetuate their beneficent intention. It was granted. An artificial, immortal being was created by the crown, capable of receiving and distributing forever, according to the will of the donors, the donations which should be made to it. On this being the contributions which had been collected were immediately bestowed. These gifts were made, not, indeed, to make a profit for the donors, or their posterity, but for something in their opinion of inestimable value; for something which they deemed a full equivalent for the money with which it was purchased. The consideration for which they stipulated is the perpetual application of the fund to its object, in the mode prescribed by themselves. Their descendants may take no interest in the preservation of this consideration. But in this respect their descendants are not their representatives. They are represented

4 Wh. 642.

by the corporation. The corporation is the assignee of their rights, stands in their place, and distributes their bounty, as they would themselves have distributed it, had they been immortal. So with respect to the students who are to derive learning from this source. The corporation is a trustee for them also. Their potential rights, which, taken distributively, are imperceptible, amount collectively to a most important interest. These are, in the aggregate, to be exercised, asserted, and protected by the corporation. They were as completely out of the donors, at the instant of their being vested in the corporation, and as incapable of being asserted by the students, as at present.

According to the theory of the British constitution, their parliament is omnipotent. To annul corporate rights might give a shock to public opinion, which that government has chosen to avoid; but its power is not questioned. Had parliament, immediately after the emanation of this charter, and the execution of those conveyances which followed it, annulled the instrument, so that the living donors would have witnessed the disappointment of their hopes, the perfidy of the transaction would have been universally acknowledged. Yet then, as now, the donors would have had no interest in the property; then, as now, those who might be students would have had no rights to be violated; then, as now, it might be said that the trustees, in whom the rights of all were combined, possessed no private, individual, beneficial interest in the property confided to their protection. Yet the contract would at that time have been deemed sacred by all. What has since occurred to strip it of its inviolability? Circumstances have not changed it. In reason, in justice, and in law, it is now what it was in 1769.

This is plainly a contract to which the donors, the trustees, and the crown (to whose rights and obligations New Hampshire succeeds,) were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract on the faith of which real and personal estate has been conveyed to the corporation.

4 Wh. 643.

It is, then, a contract within the letter of the constitution, and within its spirit also, unless the fact, that the property is invested by the donors in trustees for the promotion of religion and education, for the benefit of persons who are perpetually changing, though the objects remain the same, shall create a particular exception, taking this case out of the prohibition contained in the constitution.

It is more than possible that the preservation of rights of this description was not particularly in the view of the framers of the constitution, when the clause under consideration was introduced into that instrument. It is probable that interferences of more frequent recurrence, to which the temptation was stronger, and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the state legislatures. But although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule, when established, unless some plain and strong reason for excluding it can be given. It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to go farther, and to say, that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception. The case, being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception.

On what safe and intelligible ground can this exception stand? There is no expression in the constitution, no sentiment delivered by its contemporaneous expounders, which would justify us in making it. In the absence of all authority of this kind, is there, in the nature and reason of the case itself, that which would sustain a construction of the constitution not warranted by its words? Are contracts of this description of a character

4 Wh. 644.

to excite so little interest that we must exclude them from the provisions of the constitution, as being unworthy of the attention of those who framed the instrument? Or does public policy so imperiously demand their remaining exposed to legislative alteration as to compel us, or rather permit us, to say that these words, which were introduced to give stability to contracts, and which in their plain import comprehend this contract, must yet be so construed as to exclude it?

Almost all eleemosynary corporations, those which are created for the promotion of religion, of charity, or of education, are of the same character. The law of this case is the law of all. In every literary or charitable institution, unless the objects of the bounty be themselves incorporated, the whole legal interest is in trustees, and can be asserted only by them. The donors or claimants of the bounty, if they can appear in court at all, can appear only to complain of the trustees. In all other situations they are identified with, and personated by, the trustees; and their rights are to be defended and maintained by them. Religion, charity, and education are, in the law of England, legatees or donees, capable of receiving bequests or donations in this form. They appear in court, and claim or defend, by the corporation. Are they of so little estimation in the United States that contracts for their benefit must be excluded from the protection of words which in their natural import include them? Or do such contracts so necessarily require new-modelling by the authority of the legislature that the ordinary rules of construction must be disregarded in order to leave them exposed to legislative alteration?

All feel that these objects are not deemed unimportant in the United States. The interest which this case has excited proves that they are not. The framers of the constitution did not deem them unworthy of its care and protection. They have, though in a different mode, manifested their respect for science, by reserving to the government of the union the power "to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive

4 Wh. 646.

right to their respective writings and discoveries." They have so far withdrawn science and the useful arts from the action of the state governments. Why, then, should they be supposed so regardless of contracts made for the advancement of literature, as to intend to exclude them from provisions made for the security of ordinary contracts between man and man? No reason for making this supposition is perceived.

If the insignificance of the object does not require that we should exclude contracts respecting it from the protection of the constitution; neither, as we conceive, is the policy of leaving them subject to legislative alteration so apparent as to require a forced construction of that instrument in order to effect it. These eleemosynary institutions do not fill the place which would otherwise be occupied by government, but that which would otherwise remain vacant. They are complete acquisitions to literature. They are donations to education; donations which any government must be disposed rather to encourage than to discountenance. It requires no very critical examination of the human mind to enable us to determine that one great inducement to these gifts is the conviction felt by the giver that the disposition he makes of them is immutable. It is probable that no man ever was, and that no man ever will be, the founder of a college, believing at the time that an act of incorporation constitutes no security for the institution; believing that it is immediately to be deemed a public institution, whose funds are to be governed and applied, not by the will of the donor, but by the will of the legislature. All such gifts are made in the pleasing, perhaps delusive hope, that the charity will flow forever in the channel which the givers have marked out for it. If every man finds in his own bosom strong evidence of the universality of this sentiment, there can be but little reason to imagine that the framers of our constitution were strangers to it, and that, feeling the necessity and policy of giving permanence and security to contracts, of withdrawing them from the influence of legislative bodies, whose fluctuating policy, and repeated interferences, produced the most perplexing and

4 Wh. 647.

injurious embarrassments, they still deemed it necessary to leave these contracts subject to those interferences. The motives for such an exception must be very powerful, to justify the construction which makes it.

The motives suggested at the bar grow out of the original appointment of the trustees, which is supposed to have been in a spirit hostile to the genius of our government, and the presumption, that, if allowed to continue themselves, they now are, and must remain forever, what they originally were. Hence is inferred the necessity of applying to this corporation, and to other similar corporations, the correcting and improving hand of the legislature.

It has been urged repeatedly, and certainly with a degree of earnestness which attracted attention, that the trustees, deriving their power from a regal source, must necessarily partake of the spirit of their origin; and that their first principles, unimproved by that resplendent light which has been shed around them, must continue to govern the college, and to guide the students. Before we inquire into the influence which this argument ought to have on the constitutional question, it may not be amiss to examine the fact on which it rests. The first trustees were undoubtedly named in the charter by the crown; but at whose suggestion were they named? By whom were they selected? The charter informs us. Dr. Wheelock had represented, "that, for many weighty reasons, it would be expedient, &c., that the gentlemen whom he had already nominated in his last will, &c., to be trustees in America, should be of the corporation now proposed." When, afterwards, the trustees are named in the charter, can it be doubted that the persons mentioned by Dr. Wheelock in his will were appointed? Some were probably added by the crown, with the approbation of Dr. Wheelock. Among these is the Doctor himself. If any others were appointed at the instance of the crown, they are the governor, three members of the council, and the speaker of the house of representatives, of the colony of New Hampshire. The stations filled by these persons ought to rescue them from any

4 Wh. 649.

other imputation than too great a dependence on the crown. If in the revolution that followed they acted under the influence of this sentiment, they must have ceased to be trustees; if they took part with their countrymen, the imputation which suspicion might excite would no longer attach to them. The original trustees, then, or most of them, were named by Dr. Wheelock, and those who were added to his nomination, most probably with his approbation, were among the most eminent and respectable individuals in New Hampshire.

The only evidence which we possess of the character of Dr. Wheelock is furnished by this charter. The judicious means employed for the accomplishment of his object, and the success which attended his endeavors, would lead to the opinion that he united a sound understanding to that humanity and benevolence which suggested his undertaking. It surely cannot be assumed that his trustees were selected without judgment. With as little probability can it be assumed, that, while the light of science and of liberal principles pervades the whole community, these originally benighted trustees remain in utter darkness, incapable of participating in the general improvement; that, while the human race is rapidly advancing, they are stationary. Reasoning *a priori*, we should believe that learned and intelligent men, selected by its patrons for the government of a literary institution, would select learned and intelligent men for their successors—men as well fitted for the government of a college as those who might be chosen by other means. Should this reasoning ever prove erroneous in a particular case, public opinion, as has been stated at the bar, would correct the institution. The mere possibility of the contrary would not justify a construction of the constitution which should exclude these contracts from the protection of a provision whose terms comprehend them.

The opinion of the court, after mature deliberation, is, that this is a contract, the obligation of which cannot be impaired without violating the constitution of the United States. This opinion appears to us to be equally supported by reason and by the former decisions of this court.

4 Wh. 650.

2. We next proceed to the inquiry, whether its obligation has been impaired by those acts of the legislature of New Hampshire to which the special verdict refers.

From the review of this charter which has been taken, it appears that the whole power of governing the college, of appointing and removing tutors, of fixing their salaries, of directing the course of study to be pursued by the students, and of filling up vacancies created in their own body, was vested in the trustees. On the part of the crown it was expressly stipulated, that this corporation, thus constituted, should continue forever; and that the number of trustees should forever consist of twelve, and no more. By this contract the crown was bound, and could have made no violent alteration in its essential terms without impairing its obligation.

By the revolution, the duties, as well as the powers, of government devolved on the people of New Hampshire. It is admitted that among the latter was comprehended the transcendent power of parliament, as well as that of the executive department. It is too clear to require the support of argument, that all contracts and rights respecting property remained unchanged by the revolution. The obligations, then, which were created by the charter to Dartmouth College, were the same in the new that they had been in the old government. The power of the government was also the same. A repeal of this charter, at any time prior to the adoption of the present constitution of the United States, would have been an extraordinary and unprecedented act of power, but one which could have been contested only by the restrictions upon the legislature to be found in the constitution of the state. But the constitution of the United States has imposed this additional limitation, that the legislature of a state shall pass no act "impairing the obligation of contracts."

It has been already stated that the act "to amend the charter, and enlarge and improve the corporation of Dartmouth College," increases the number of trustees to twenty-one, gives the appointment of the additional members to the executive of

4 Wh. 651.

the state, and creates a board of overseers, to consist of twenty-five persons, of whom twenty-one are also appointed by the executive of New Hampshire, who have power to inspect and control the most important acts of the trustees.

On the effect of this law two opinions cannot be entertained. Between acting directly, and acting through the agency of trustees and overseers, no essential difference is perceived. The whole power of governing the college is transferred from trustees appointed according to the will of the founder expressed in the charter to the executive of New Hampshire. The management and application of the funds of this eleemosynary institution, which are placed by the donors in the hands of trustees named in the charter, and empowered to perpetuate themselves, are placed by this act under the control of the government of the state. The will of the state is substituted for the will of the donors, in every essential operation of the college. This is not an immaterial change. The founders of the college contracted not merely for the perpetual application of the funds, which they gave, to the objects for which those funds were given; they contracted, also, to secure that application by the constitution of the corporation. They contracted for a system which should, as far as human foresight can provide, retain forever the government of the literary institution they had formed in the hands of persons approved by themselves. This system is totally changed. The charter of 1769 exists no longer. It is reorganized; and reorganized in such a manner as to convert a literary institution, moulded according to the will of its founders, and placed under the control of private literary men, into a machine entirely subservient to the will of government. This may be for the advantage of this college in particular, and may be for the advantage of literature in general; but it is not according to the will of the donors, and is subversive of that contract on the faith of which their property was given.

In the view which has been taken of this interesting case, the court has confined itself to the rights possessed by the trustees, as the assignees and representatives of the donors and

4 Wh. 652.

founders, for the benefit of religion and literature. Yet it is not clear that the trustees ought to be considered as destitute of such beneficial interest in themselves as the law may respect. In addition to their being the legal owners of the property, and to their having a freehold right in the powers confided to them, the charter itself countenances the idea that trustees may also be tutors with salaries. The first president was one of the original trustees; and the charter provides, that, in case of vacancy in that office, "the senior professor or tutor, being one of the trustees, shall exercise the office of president, until the trustees shall make choice of and appoint a president." According to the tenor of the charter, then, the trustees might, without impropriety, appoint a president and other professors from their own body. This is a power not entirely unconnected with an interest. Even if the proposition of the counsel for the defendant were sustained; if it were admitted that those contracts only are protected by the constitution, a beneficial interest in which is vested in the party who appears in court to assert that interest; yet it is by no means clear that the trustees of Dartmouth College have no beneficial interest in themselves.

But the court has deemed it unnecessary to investigate this particular point, being of opinion, on general principles, that, in these private eleemosynary institutions, the body corporate, as possessing the whole legal and equitable interest, and completely representing the donors, for the purpose of executing the trust, has rights which are protected by the constitution.

It results from this opinion that the acts of the legislature of New Hampshire, which are stated in the special verdict found in this cause, are repugnant to the constitution of the United States; and that the judgment on this special verdict ought to have been for the plaintiffs. The judgment of the state court must, therefore, be reversed.

4 Wh. 654.

LOUGHBOROUGH v. BLAKE.

FEBRUARY TERM, 1820.

[5 Wheaton's Reports, 317–325.]

The facts in this case are unimportant. The sole question is stated at the beginning of the opinion of the court as delivered by the chief justice.

This case presents to the consideration of the court a single question. It is this: Has congress a right to impose a direct tax on the district of Columbia?

The counsel who maintains the negative has contended that congress must be considered in two distinct characters. In one character, as legislating for the states; in the other, as a local legislature for the district. In the latter character, it is admitted, the power of levying direct taxes may be exercised; but, it is contended, for district purposes only, in like manner as the legislature of a state may tax the people of a state for state purposes.

Without inquiring at present into the soundness of this distinction, its possible influence on the application in this district of the first article of the constitution, and of several of the amendments, may not be altogether unworthy of consideration. It will readily suggest itself to the gentlemen who press this argument, that those articles, which, in general terms, restrain the power of congress, may be applied to the laws enacted by that body for the district, if it be considered as governing the district in its character as the national legislature, with less difficulty than if it be considered a mere local legislature.

But we deem it unnecessary to pursue this investigation, because we think the right of congress to tax the district does not depend solely on the grant of exclusive legislation.

5 Wh. 318.

The eighth section of the first article gives to congress the "power to lay and collect taxes, duties, imposts, and excises," for the purposes therein after mentioned. This grant is general, without limitation as to place. It consequently extends to all places over which the government extends. If this could be doubted, the doubt is removed by the subsequent words which modify the grant. These words are, "but all duties, imposts, and excises shall be uniform throughout the United States." It will not be contended that the modification of the power extends to places to which the power itself does not extend. The power, then, to lay and collect duties, imposts, and excises, may be exercised, and must be exercised, throughout the United States. Does this term designate the whole, or any particular portion, of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of states and territories. The district of Columbia, or the territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania; and it is not less necessary, on the principles of our constitution, that uniformity in the imposition of imposts, duties, and excises should be observed in the one than in the other. Since, then, the power to lay and collect taxes, which includes direct taxes, is obviously coextensive with the power to lay and collect duties, imposts, and excises, and since the latter extends throughout the United States, it follows that the power to impose direct taxes also extends throughout the United States.

The extent of the grant being ascertained, how far is it abridged by any part of the constitution?

The twentieth section of the first article declares that "representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers."

The object of this regulation is, we think, to furnish a standard by which taxes are to be apportioned, not to exempt from their operation any part of our country. Had the intention been to exempt from taxation those who were not represented in con-

5 Wh. 319.

gress, that intention would have been expressed in direct terms. The power having been expressly granted, the exception would have been expressly made. But a limitation can scarcely be said to be insinuated. The words used do not mean that direct taxes shall be imposed on states only which are represented, or shall be apportioned to representatives; but that direct taxation, in its application to states, shall be apportioned to numbers. Representation is not made the foundation of taxation. If, under the enumeration of a representative for every thirty thousand souls, one state had been found to contain fifty-nine thousand, and another sixty thousand, the first would have been entitled to only one representative and the last to two. Their taxes, however, would not have been as one to two, but as fifty-nine to sixty. This clause was obviously not intended to create any exemption from taxation, or to make taxation dependent on representation, but to furnish a standard for the apportionment of each on the states.

The fourth paragraph of the ninth section of the same article will next be considered. It is in these words: "No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken."

The census referred to is in that clause of the constitution which has just been considered, which makes numbers the standard by which both representatives and direct taxes shall be apportioned among the states. The actual enumeration is to be made "within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct."

As the direct and declared object of this census is to furnish a standard by which "representatives and direct taxes may be apportioned among the several states which may be included within this union," it will be admitted that the omission to extend it to the district or the territories would not render it defective. The census referred to is admitted to be a census exhibiting the numbers of the respective states. It cannot, however, be admitted that the argument, which limits the applica-

5 Wh. 320.

tion of the power of direct taxation to the population contained in this census, is a just one. The language of the clause does not imply this restriction. It is not that "no capitation or other direct tax shall be laid, unless on those comprehended within the census herein before directed to be taken," but "unless in proportion to" that census. Now this proportion may be applied to the district or territories. If an enumeration be taken of the population in the district and territories, on the same principles on which the enumeration of the respective states is made, then the information is acquired by which a direct tax may be imposed on the district and territories "in proportion to the census or enumeration" which the constitution directs to be taken.

The standard, then, by which direct taxes must be laid, is applicable to this district, and will enable congress to apportion on it its just and equal share of the burden, with the same accuracy as on the respective states. If the tax be laid in this proportion, it is within the very words of the restriction. It is a tax "in proportion to the census or enumeration" referred to.

But the argument is presented in another form, in which its refutation is more difficult. It is urged against this construction that it would produce the necessity of extending direct taxation to the district and territories, which would not only be inconvenient, but contrary to the understanding and practice of the whole government. If the power of imposing direct taxes be coextensive with the United States, then it is contended that the restrictive clause, if applicable to the district and territories, requires that the tax should be extended to them, since to omit them would be to violate the rule of proportion.

We think a satisfactory answer to this argument may be drawn from a fair comparative view of the different clauses of the constitution which have been recited.

That the general grant of power to lay and collect taxes is made in terms which comprehend the district and territories, as well as the states, is, we think, incontrovertible. The subsequent clauses are intended to regulate the exercise of this power,

5 Wh. 322.

not to withdraw from it any portion of the community. The words in which those clauses are expressed import this intention. In thus regulating its exercise, a rule is given, in the second section of the first article, for its application to the respective states. That rule declares how direct taxes upon the states shall be imposed. They shall be apportioned upon the several states according to their numbers. If, then, a direct tax be laid at all, it must be laid on every state, conformably to the rule provided in the constitution. Congress has clearly no power to exempt any state from its due share of the burden. But this regulation is expressly confined to the states, and creates no necessity for extending the tax to the district or territories. The words of the ninth section do not in terms require that the system of direct taxation, when resorted to, shall be extended to the territories, as the words of the second section require that it shall be extended to all the states. They therefore may, without violence, be understood to give a rule when the territories shall be taxed, without imposing the necessity of taxing them. It could scarcely escape the members of the convention that the expense of executing the law in a territory might exceed the amount of the tax. But be this as it may, the doubt created by the words of the ninth section relates to the obligation to apportion a direct tax on the territories as well as the states, rather than to the power to do so.

If, then, the language of the constitution be construed to comprehend the territories and the district of Columbia as well as the states, that language confers on congress the power of taxing the district and territories as well as the states. If the general language of the constitution should be confined to the states, still the sixteenth paragraph of the eighth section gives to congress the power of exercising "exclusive legislation in all cases whatsoever within this district."

On the extent of these terms, according to the common understanding of mankind, there can be no difference of opinion; but it is contended that they must be limited by that great principle which was asserted in our revolution, that representation is inseparable from taxation.

5 Wh. 323.

The difference between requiring a continent, with an immense population, to submit to be taxed by a government having no common interest with it, separated from it by a vast ocean, restrained by no principle of apportionment, and associated with it by no common feelings; and permitting the representatives of the American people, under the restrictions of our constitution, to tax a part of the society, which is either in a state of infancy advancing to manhood, looking forward to complete equality so soon as that state of manhood shall be attained, as is the case with the territories; or which has voluntarily relinquished the right of representation, and has adopted the whole body of congress for its legitimate government, as is the case with the district, is too obvious not to present itself to the minds of all. Although in theory it might be more congenial to the spirit of our institutions to admit a representative from the district, it may be doubted whether in fact its interests would be rendered thereby the more secure; and certainly the constitution does not consider their want of a representative in congress as exempting it from equal taxation.

If it were true, that, according to the spirit of our constitution, the power of taxation must be limited by the right of representation, whence is derived the right to lay and collect duties, imposts, and excises within this district? If the principles of liberty and of our constitution forbid the raising of revenue from those who are not represented, do not these principles forbid the raising it by duties, imposts, and excises, as well as by a direct tax? If the principles of our revolution give a rule applicable to this case, we cannot have forgotten that neither the stamp act nor the duty on tea were direct taxes.

Yet it is admitted that the constitution not only allows, but enjoins, the government to extend the ordinary revenue system to this district.

If it be said that the principle of uniformity, established in the constitution, secures the district from oppression in the imposition of indirect taxes, it is not less true that the principle of apportionment, also established in the constitution, secures the

district from any oppressive exercise of the power to lay and collect direct taxes.

After giving this subject its serious attention, the court is unanimously of opinion that congress possesses, under the constitution, the power to lay and collect direct taxes within the district of Columbia, in proportion to the census directed to be taken by the constitution, and that there is no error in the judgment of the circuit court.

Judgment affirmed.

5 Wh. 325.

OWINGS *v.* SPEED AND OTHERS.

FEBRUARY TERM, 1820.

[5 Wheaton's Reports, 420–424.]

In the following opinion of the court,* delivered by Chief Justice Marshall, we have all the facts of this case:—

This was an ejectment brought by the plaintiff in the circuit court of the United States for the district of Kentucky, to recover a lot of ground lying in Bardstown. This town was laid off, in 1780, on a tract of land consisting of one thousand acres, for which, in 1785, a patent was issued by the commonwealth of Virginia to Bard and Owings. In 1788 the legislature of Virginia passed an act, vesting one hundred acres, part of this tract, in trustees, to be laid off in lots, some of them to be given to settlers, and others to be sold for the benefit of the proprietors. The cause depends mainly on the validity of this act. It is contended to be a violation of that part of the constitution of the United States which forbids a state to pass any law impairing the obligation of contracts.

Much reason is furnished by the record for presuming the consent of the proprietors to this law; but the circuit court has decided the question independently of this consent, and that decision is now to be reviewed.

Before we determine on the construction of the constitution in relation to a question of this description, it is necessary to inquire whether the provisions of that instrument apply to any acts of the state legislatures which were of the date with that which it is now proposed to consider.

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* Only so much of this opinion is here given as bears on the constitutional question involved in the case.

This act was passed in the session of 1788. Did the constitution of the United States then operate upon it?

In September, 1787, after completing the great work in which they had been engaged, the convention resolved that the constitution should be laid before the congress of the United States, to be submitted by that body to conventions of the several states, to be convened by their respective legislatures; and expressed the opinion, that, as soon as it should be ratified by the conventions of nine states, congress should fix a day, on which electors should be appointed by the states, a day on which the electors should assemble to vote for president and vice-president, "and the time and place for commencing proceedings under this constitution."

The conventions of nine states having adopted the constitution, congress, in September, or October, 1788, passed a resolution in conformity with the opinions expressed by the convention, and appointed the first Wednesday in March of the ensuing year as the day, and the then seat of congress as the place, "for commencing proceedings under the constitution."

Both governments could not be understood to exist at the same time. The new government did not commence until the old government expired. It is apparent that the government did not commence on the constitution being ratified by the ninth state; for these ratifications were to be reported to congress, whose continuing existence was recognized by the convention, and who were requested to continue to exercise their powers for the purpose of bringing the new government into operation. In fact, congress did continue to act as a government until it dissolved, on the first of November, by the successive disappearance of its members. It existed potentially until the second of March, the day preceding that on which the members of the new congress were directed to assemble.

The resolution of the convention might originally have suggested a doubt, whether the government could be in operation for every purpose before the choice of a president; but this doubt has been long solved, and were it otherwise, its discussion would

5 Wh. 422.

be useless, since it is apparent that its operation did not commence before the first Wednesday in March, 1789, before which time Virginia had passed the act which is alleged to violate the constitution.

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Judgment affirmed, with costs.

5 Wh. 422.

COHENS v. STATE OF VIRGINIA.

FEBRUARY TERM, 1821.

[6 Wheaton's Reports, 264–447.]

P. J. and M. J. Cohen were indicted, under an act of Virginia, for selling lottery tickets; and judgment was given against them. An appeal to the higher Virginia courts being refused, because no higher court had jurisdiction of the subject-matter, they sued out a writ of error* to the supreme court of the United States. The attorney for Virginia moved to dismiss this writ, on the ground of want of jurisdiction in the supreme court, upon which motion Chief Justice Marshall delivered the opinion of the court as follows:—†

This is a writ of error to a judgment rendered in the court of hustings for the borough of Norfolk, on an information for selling lottery tickets, contrary to an act of the legislature of Virginia. In the state court the defendant claimed the protection of an act of congress. A case was agreed between the parties, which states the act of assembly on which the prosecution was founded, and the act of congress on which the defendant relied, and concludes in these words: "If upon this case the court shall be of opinion that the acts of congress before mentioned were valid, and, on the true construction of those acts, the lottery tickets sold by the defendants as aforesaid might lawfully be sold within the state of Virginia, notwithstanding the act or statute of the general assembly of Virginia prohibiting such sale, then judgment to be entered for the defendants: And

* This writ brings a suit from a lower into a higher court, alleging error in the opinion given by the lower tribunal.

† The opinion upon the merits of this case is not given, as it touched no constitutional point.

if the court should be of opinion that the statute or act of the general assembly of the state of Virginia, prohibiting such sale, is valid, notwithstanding the said acts of congress, then judgment to be entered that the defendants are guilty, and that the commonwealth recover against them one hundred dollars and costs."

Judgment was rendered against the defendants; and the court in which it was rendered being the highest court of the state, in which the cause was cognizable, the record has been brought into this court by writ of error.

The defendant in error moves to dismiss this writ for want of jurisdiction.

In support of this motion three points have been made, and argued with the ability which the importance of the question merits. These points are,—

1st. That a state is a defendant.

2d. That no writ of error lies from this court to a state court.

3d. The third point has been presented in different forms by the gentlemen who have argued it. The counsel who opened the cause said that the want of jurisdiction was shown by the subject-matter of the case. The counsel who followed him said that jurisdiction was not given by the judiciary act. The court has bestowed all its attention on the arguments of both gentlemen, and supposes that their tendency is to show that this court has no jurisdiction of the case, or, in other words, has no right to review the judgment of the state court, because neither the constitution nor any law of the United States has been violated by that judgment.

The questions presented to the court by the two first points made at the bar are of great magnitude, and may be truly said vitally to affect the union. They exclude the inquiry, whether the constitution and laws of the United States have been violated by the judgment which the plaintiffs in error seek to review; and maintain, that, admitting such violation, it is not in the power of the government to apply a corrective. They maintain that the nation does not possess a department capable of restraining

peaceably, and by authority of law, any attempts which may be made by a part against the legitimate powers of the whole; and that the government is reduced to the alternative of submitting to such attempts, or of resisting them by force. They maintain that the constitution of the United States has provided no tribunal for the final construction of itself, or of the laws or treaties of the nation; but that this power may be exercised in the last resort by the courts of every state in the union. That the constitution, laws, and treaties may receive as many constructions as there are states; and that this is not a mischief, or, if a mischief, it is irremediable. These abstract propositions are to be determined; for he, who demands decision without permitting inquiry, affirms that the decision he asks does not depend on inquiry.

If such be the constitution, it is the duty of the court to bow with respectful submission to its provisions. If such be not the constitution, it is equally the duty of this court to say so; and to perform that task which the American people have assigned to the judicial department.

1st. The first question to be considered is, whether the jurisdiction of this court is excluded by the character of the parties, one of them being a state, and the other a citizen of that state?

The second section of the third article of the constitution defines the extent of the judicial power of the United States. Jurisdiction is given to the courts of the union in two classes of cases. In the first, their jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends "all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." This clause extends the jurisdiction of the court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied against the express words of the article.

In the second class, the jurisdiction depends entirely on the

6 Wh. 377.

character of the parties. In this are comprehended "controversies between two or more states, between a state and citizens of another state," "and between a state and foreign states, citizens or subjects." If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the union.

The counsel for the defendant in error have stated that the cases which arise under the constitution must grow out of those provisions which are capable of self-execution; examples of which are to be found in the second section of the fourth article, and in the tenth section of the first article.

A case which arises under a law of the United States must, we are likewise told, be a right given by some act which becomes necessary to execute the powers given in the constitution, of which the law of naturalization is mentioned as an example.

The use intended to be made of this exposition of the first part of the section, defining the extent of the judicial power is not clearly understood. If the intention be merely to distinguish cases arising under the constitution from those arising under a law, for the sake of precision in the application of this argument, these propositions will not be controverted. If it be to maintain that a case, arising under the constitution or a law, must be one in which a party comes into court to demand something conferred on him by the constitution or a law, we think the construction too narrow. A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either. Congress seems to have intended to give its own construction of this part of the constitution in the twenty-fifth section of the judiciary act; and we perceive no reason to depart from that construction.

The jurisdiction of the court, then, being extended by the letter of the constitution to all cases arising under it, or under the laws of the United States, it follows that those who would

6 Wh. 379.

withdraw any case of this description from that jurisdiction must sustain the exemption they claim on the spirit and true meaning of the constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed.

The counsel for the defendant in error have undertaken to do this; and have laid down the general proposition, that a sovereign, independent state is not suable, except by its own consent.

This general proposition will not be controverted. But its consent is not requisite in each particular case. It may be given in a general law. And if a state has surrendered any portion of its sovereignty, the question, whether a liability to suit be a part of this portion, depends on the instrument by which the surrender is made. If, upon a just construction of that instrument, it shall appear that the state has submitted to be sued, then it has parted with this sovereign right of judging in every case on the justice of its own pretensions, and has entrusted that power to a tribunal in whose impartiality it confides.

The American states, as well as the American people, have believed a close and firm union to be essential to their liberty and to their happiness. They have been taught by experience that this union cannot exist without a government for the whole; and they have been taught by the same experience that this government would be a mere shadow, that must disappoint all their hopes, unless invested with large portions of that sovereignty which belongs to independent states. Under the influence of this opinion, and thus instructed by experience, the American people, in the convention of their respective states, adopted the present constitution.

If it could be doubted whether from its nature it were not supreme in all cases where it is empowered to act, that doubt would be removed by the declaration, that "this constitution, and the laws of the United States, which shall be made in pursuance thereof, and all treaties made or which shall be made

6 Wh. 380.

under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby; anything in the constitution or laws of any state to the contrary notwithstanding."

This is the authoritative language of the American people; and, if gentlemen please, of the American states. It marks, with lines too strong to be mistaken, the characteristic distinction between the government of the union and those of the states. The general government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the constitution; and if there be any who deny its necessity, none can deny its authority.

To this supreme government ample powers are confided; and if it were possible to doubt the great purposes for which they were so confided, the people of the United States have declared that they are given "in order to form a more perfect union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to themselves and their posterity."

With the ample powers confided to this supreme government, for these interesting purposes, are connected many express and important limitations on the sovereignty of the states, which are made for the same purposes. The powers of the union, on the great subjects of war, peace, and commerce, and on many others, are in themselves limitations of the sovereignty of the states; but in addition to these, the sovereignty of the states is surrendered in many instances where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on congress than a conservative power to maintain the principles established in the constitution. The maintenance of these principles in their purity is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed is the judicial department. It is authorized to decide all cases of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction no exception

is made of those cases in which a state may be a party. When we consider the situation of the government of the union and of a state in relation to each other, the nature of our constitution, the subordination of the state governments to that constitution, the great purpose for which jurisdiction over all cases arising under the constitution and laws of the United States is confided to the judicial department, are we at liberty to insert in this general grant an exception of those cases in which a state may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the constitution or laws of the United States is cognizable in the courts of the union, whoever may be the parties to that case.

Had any doubt existed with respect to the just construction of this part of the section, that doubt would have been removed by the enumeration of those cases to which the jurisdiction of the federal courts is extended in consequence of the character of the parties. In that enumeration we find "controversies between two or more states, between a state and citizens of another state," "and between a state and foreign states, citizens, or subjects."

One of the express objects, then, for which the judicial department was established, is the decision of controversies between states, and between a state and individuals. The mere circumstance that a state is a party gives jurisdiction to the court. How, then, can it be contended that the very same instrument, in the very same section, should be so construed as that this same circumstance should withdraw a case from the jurisdiction of the court, where the constitution or laws of the United States are supposed to have been violated? The constitution gave to every person having a claim upon a state a right to submit his case to the court of the nation. However unimportant his claim might be, however little the community might be interested in its decision, the framers of our constitution thought it necessary, for the purposes of justice, to provide a tribunal as superior to influence as possible, in which that

6 Wh. 383.

claim might be decided. Can it be imagined that the same persons considered a case involving the constitution of our country and the majesty of the laws, questions in which every American citizen must be deeply interested, as withdrawn from this tribunal because a state is a party?

While weighing arguments drawn from the nature of government, and from the general spirit of an instrument, and urged for the purpose of narrowing the construction which the words of that instrument seem to require, it is proper to place in the opposite scale those principles, drawn from the same sources, which go to sustain the words in their full operation and natural import. One of these, which has been pressed with great force by the counsel for the plaintiffs in error, is that the judicial power of every well constituted government must be coextensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws.

If any proposition may be considered as a political axiom, this, we think, may be so considered. In reasoning upon it as an abstract question, there would probably exist no contrariety of opinion respecting it. Every argument, proving the necessity of the department, proves also the propriety of giving this extent to it. We do not mean to say that the jurisdiction of the courts of the union should be construed to be coextensive with the legislative merely because it is fit that it should be so; but we mean to say that this fitness furnishes an argument in construing the constitution which ought never to be overlooked, and which is most especially entitled to consideration when we are inquiring whether the words of the instrument which purport to establish this principle shall be contracted for the purpose of destroying it.

The mischievous consequences of the construction contended for on the part of Virginia are also entitled to great consideration. It would prostrate, it has been said, the government and its laws at the feet of every state in the union. And would not this be its effect? What power of the government could be

executed by its own means in any state disposed to resist its execution by a course of legislation? The laws must be executed by individuals acting within the several states. If these individuals may be exposed to penalties, and if the courts of the union cannot correct the judgments by which these penalties may be enforced, the course of the government may be, at any time, arrested by the will of one of its members. Each member will possess a veto on the will of the whole.

The answer which has been given to this argument does not deny its truth, but insists that confidence is reposed, and may be safely reposed, in the state institutions; and that, if they shall ever become so insane or so wicked as to seek the destruction of the government, they may accomplish their object by refusing to perform the functions assigned to them.

We readily concur with the counsel for the defendant in the declaration that the cases which have been put of direct legislative resistance for the purpose of opposing the acknowledged powers of the government are extreme cases, and in the hope that they will never occur; but we cannot help believing that a general conviction of the total incapacity of the government to protect itself and its laws in such cases would contribute in no inconsiderable degree to their occurrence.

Let it be admitted that the cases which have been put are extreme and improbable, yet there are gradations of opposition to the laws, far short of those cases, which might have a baneful influence on the affairs of the nation. Different states may entertain different opinions on the true construction of the constitutional powers of congress. We know, that at one time the assumption of the debts contracted by the several states during the war of our revolution was deemed unconstitutional by some of them. We know, too, that at other times certain taxes imposed by congress have been pronounced unconstitutional. Other laws have been questioned partially, while they were supported by the great majority of the American people. We have no assurance that we shall be less divided than we have been. States may legislate in conformity to their opinions,

and may enforce those opinions by penalties. It would be hazarding too much to assert that the judicatures of the states will be exempt from the prejudices by which the legislatures and people are influenced, and will constitute perfectly impartial tribunals. In many states the judges are dependent for office and for salary on the will of the legislature. The constitution of the United States furnishes no security against the universal adoption of this principle. When we observe the importance which that constitution attaches to the independence of judges, we are the less inclined to suppose that it can have intended to leave these constitutional questions to tribunals where this independence may not exist, in all cases where a state shall prosecute an individual who claims the protection of an act of congress. These prosecutions may take place even without a legislative act. A person making a seizure under an act of congress may be indicted as a trespasser, if force has been employed, and of this a jury may judge. How extensive may be the mischief, if the first decisions in such cases should be final!

These collisions may take place in times of no extraordinary commotion. But a constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed, if they have not provided it, as far as its nature will permit, with the means of self-preservation from the perils it may be destined to encounter. No government ought to be so defective in its organization as not to contain within itself the means of securing the execution of its own laws against other dangers than those which occur every day. Courts of justice are the means most usually employed; and it is reasonable to expect that a government should repose on its own courts, rather than on others. There is certainly nothing in the circumstances under which our constitution was formed, nothing in the history of the times, which would justify the opinion that the confidence reposed in the states was so implicit

6 Wh. 387.

as to leave in them and their tribunals the power of resisting or defeating, in the form of law, the legitimate measures of the union. The requisitions of congress, under the confederation, were as constitutionally obligatory as the laws enacted by the present congress. That they were habitually disregarded is a fact of universal notoriety. With the knowledge of this fact, and under its full pressure, a convention was assembled to change the system. Is it so improbable that they should confer on the judicial department the power of construing the constitution and laws of the union in every case, in the last resort, and of preserving them from all violation from every quarter, so far as judicial decisions can preserve them, that this improbability should essentially affect the construction of the new system? We are told, and we are truly told, that the great change which is to give efficacy to the present system is its ability to act on individuals directly, instead of acting through the instrumentality of state governments. But ought not this ability, in reason and sound policy, to be applied directly to the protection of individuals employed in the execution of the laws, as well as to their coercion? Your laws reach the individual without the aid of any other power; why may they not protect him from punishment for performing his duty in executing them?

The counsel for Virginia endeavor to obviate the force of these arguments by saying that the dangers they suggest, if not imaginary, are inevitable; that the constitution can make no provision against them; and that, therefore, in construing that instrument they ought to be excluded from our consideration. This state of things, they say, cannot arise until there shall be a disposition so hostile to the present political system as to produce a determination to destroy it; and when that determination shall be produced, its effects will not be restrained by parchment stipulations. The fate of the constitution will not then depend on judicial decisions. But, should no appeal be made to force, the states can put an end to the government by refusing to act. They have only not to elect senators, and it expires without a struggle.

6 Wh. 388.

It is very true, that, whenever hostility to the existing system shall become universal, it will be also irresistible. The people made the constitution, and the people can unmake it. It is the creature of their will, and lives only by their will. But this supreme and irresistible power to make or to unmake resides only in the whole body of the people, not in any subdivision of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it.

The acknowledged inability of the government, then, to sustain itself against the public will, and by force, or otherwise, to control the whole nation, is no sound argument in support of its constitutional inability to preserve itself against a section of the nation acting in opposition to the general will.

It is true, that, if all the states, or a majority of them, refuse to elect senators, the legislative powers of the union will be suspended. But if any one state shall refuse to elect them, the senate will not on that account be the less capable of performing all its functions. The argument founded on this fact would seem rather to prove the subordination of the parts to the whole than the complete independence of any one of them. The framers of the constitution were indeed unable to make any provisions which should protect that instrument against a general combination of the states, or of the people, for its destruction; and, conscious of this inability, they have not made the attempt. But they were able to provide against the operation of measures adopted in any one state, whose tendency might be to arrest the execution of the laws; and this it was the part of true wisdom to attempt. We think they have attempted it.

It has been also urged, as an additional objection to the jurisdiction of the court, that cases between a state and one of its own citizens do not come within the general scope of the constitution; and were obviously never intended to be made cognizable in the federal courts. The state tribunals might be suspected of partiality in cases between itself, or its citizens, and

aliens, or the citizens of another state, but not in proceedings by a state against its own citizens. That jealousy which might exist in the first case could not exist in the last, and therefore the judicial power is not extended to the last.

This is very true, so far as jurisdiction depends on the character of the parties; and the argument would have great force if urged to prove that this court could not establish the demand of a citizen upon his state, but is not entitled to the same force when urged to prove that this court cannot inquire whether the constitution or laws of the United States protect a citizen from a prosecution instituted against him by a state. If jurisdiction depended entirely on the character of the parties, and was not given where the parties have not an original right to come into court, that part of the second section of the third article, which extends the judicial power to all cases arising under the constitution and laws of the United States, would be mere surplusage. It is to give jurisdiction where the character of the parties would not give it that this very important part of the clause was inserted. It may be true that the partiality of the state tribunals, in ordinary controversies between a state and its citizens, was not apprehended, and therefore the judicial power of the union was not extended to such cases; but this was not the sole nor the greatest object for which this department was created. A more important, a much more interesting object, was the preservation of the constitution and laws of the United States, so far as they can be preserved by judicial authority; and therefore the jurisdiction of the courts of the union was expressly extended to all cases arising under that constitution and those laws. If the constitution or laws may be violated by proceedings instituted by a state against its own citizens, and if that violation may be such as essentially to affect the constitution and the laws, such as to arrest the progress of government in its constitutional course, why should these cases be excepted from that provision which extends the judicial power of the union to *all* cases arising under the constitution and laws?

6 Wh. 391.

After bestowing on this subject the most attentive consideration, the court can perceive no reason founded on the character of the parties for introducing an exception which the constitution has not made; and we think that the judicial power, as originally given, extends to all cases arising under the constitution or a law of the United States, whoever may be the parties.

It has been also contended that this jurisdiction, if given, is original, and cannot be exercised in the appellate form.

The words of the constitution are, "in all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned the supreme court shall have appellate jurisdiction."

This distinction between original and appellate jurisdiction excludes, we are told, in all cases, the exercise of the one where the other is given.

The constitution gives the supreme court original jurisdiction in certain enumerated cases, and gives it appellate jurisdiction in all others. Among those in which jurisdiction must be exercised in the appellate form are cases arising under the constitution and laws of the United States. These provisions of the constitution are equally obligatory, and are to be equally respected. If a state be a party, the jurisdiction of this court is original; if the case arise under a constitution or a law, the jurisdiction is appellate. But a case to which a state is a party may arise under the constitution or a law of the United States. What rule is applicable to such a case? What, then, becomes the duty of the court? Certainly, we think, so to construe the constitution as to give effect to both provisions, as far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other. We must endeavor so to construe them as to preserve the true intent and meaning of the instrument.

In one description of cases the jurisdiction of the court is founded entirely on the character of the parties; and the nature of the controversy is not contemplated by the constitution. The

character of the parties is everything, the nature of the case nothing. In the other description of cases the jurisdiction is founded entirely on the character of the case, and the parties are not contemplated by the constitution. In these the nature of the case is everything, the character of the parties nothing. When, then, the constitution declares the jurisdiction, in cases where a state shall be a party, to be original, and in all cases arising under the constitution or a law, to be appellate,—the conclusion seems irresistible that its framers designed to include in the first class those cases in which jurisdiction is given because a state is a party, and to include in the second those in which jurisdiction is given because the case arises under the constitution or a law.

This reasonable construction is rendered necessary by other considerations.

That the constitution or a law of the United States is involved in a case, and makes a part of it, may appear in the progress of a cause in which the courts of the union, but for that circumstance, would have no jurisdiction, and which, of consequence, could not originate in the supreme court. In such a case the jurisdiction can be exercised only in its appellate form. To deny its exercise in this form is to deny its existence, and would be to construe a clause, dividing the power of the supreme court, in such manner as, in a considerable degree, to defeat the power itself. All must perceive that this construction can be justified only where it is absolutely necessary. We do not think the article under consideration presents that necessity.

It is observable that in this distributive clause no negative words are introduced. This observation is not made for the purpose of contending that the legislature may "apportion the judicial power between the supreme and inferior courts according to its will." That would be, as was said by this court in the case of *Marbury* v. *Madison*, to render the distributive clause "a mere surplusage," to make it "form without substance." This cannot, therefore, be the true construction of the article.

But although the absence of negative words will not author-

6 Wh. 394.

ize the legislature to disregard the distribution of the power previously granted, their absence will justify a sound construction of the whole article, so as to give every part its intended effect. It is admitted that "affirmative words are often in their operation negative of other objects than those affirmed;" and, that, where "a negative or exclusive sense must be given to them, or they have no operation at all," they must receive that negative or exclusive sense. But where they have full operation without it, where it would destroy some of the most important objects for which the power was created, then, we think, affirmative words ought not to be construed negatively.

The constitution declares that in cases where a state is a party the supreme court shall have original jurisdiction; but does not say that its appellate jurisdiction shall not be exercised in cases where, from their nature, appellate jurisdiction is given, whether a state be or be not a party. It may be conceded, that, where the case is of such a nature as to admit of its originating in the supreme court, it ought to originate there; but where from its nature it cannot originate in that court, these words ought not to be so construed as to require it. There are many cases in which it would be found extremely difficult, and subversive of the spirit of the constitution, to maintain the construction that appellate jurisdiction cannot be exercised where one of the parties might sue or be sued in this court.

The constitution defines the jurisdiction of the supreme court, but does not define that of the inferior courts. Can it be affirmed that a state might not sue the citizen of another state in a circuit court? Should the circuit court decide for or against its jurisdiction, should it dismiss the suit, or give judgment against the state, might not its decision be revised in the supreme court? The argument is that it could not; and the very clause, which is urged to prove that the circuit court could give no judgment in the case, is also urged to prove that its judgment is irreversible. A supervising court, whose peculiar province it is to correct the errors of an inferior court, has no power to correct a judgment given without jurisdiction; because, in the

6 Wh. 395.

same case, that supervising court has original jurisdiction. Had negative words been employed, it would be difficult to give them this construction, if they would admit of any other. But without negative words this irrational construction can never be maintained.

So, too, in the same clause, the jurisdiction of the court is declared to be original "in cases affecting ambassadors, other public ministers, and consuls." There is, perhaps, no part of the article under consideration so much required by national policy as this; unless it be that part which extends the judicial power "to all cases arising under the constitution, laws, and treaties of the United States." It has been generally held that the state courts have a concurrent jurisdiction with the federal courts in cases to which the judicial power is extended, unless the jurisdiction of the federal courts be rendered exclusive by the words of the third article. If the words, "to all cases," give exclusive jurisdiction in cases affecting foreign ministers, they may also give exclusive jurisdiction, if such be the will of congress, in cases arising under the constitution, laws, and treaties of the United States. Now suppose an individual were to sue a foreign minister in a state court, and that court were to maintain its jurisdiction, and render judgment against the minister, could it be contended that this court would be incapable of revising such judgment, because the constitution had given it original jurisdiction in the case? If this could be maintained, then a clause, inserted for the purpose of excluding the jurisdiction of all other courts than this, in a particular case, would have the effect of excluding the jurisdiction of this court in that very case, if the suit were to be brought in another court, and that court were to assert jurisdiction. This tribunal, according to the argument which has been urged, could neither revise the judgment of such other court, nor suspend its proceedings; for a writ of prohibition, or any other similar writ, is in the nature of appellate process.

Foreign consuls frequently assert in our prize courts the claims of their fellow-subjects. These suits are maintained by

6 Wh. 396.

ize the legislature to disregard the distribution of the power previously granted, their absence will justify a sound construction of the whole article, so as to give every part its intended effect. It is admitted that "affirmative words are often in their operation negative of other objects than those affirmed;" and, that, where "a negative or exclusive sense must be given to them, or they have no operation at all," they must receive that negative or exclusive sense. But where they have full operation without it, where it would destroy some of the most important objects for which the power was created, then, we think, affirmative words ought not to be construed negatively.

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6 Wh. 395.

extends, and in which original jurisdiction is not expressly given, that judicial power shall be exercised in the appellate, and only in the appellate form. The original jurisdiction of this court cannot be enlarged, but its appellate jurisdiction may be exercised in every case cognizable, under the third article of the constitution, in the federal courts, in which original jurisdiction cannot be exercised; and the extent of this judicial power is to be measured, not by giving the affirmative words of the distributive clause a negative operation in every possible case, but by giving their true meaning to the words which define its extent.

The counsel for the defendant in error urge, in opposition to this rule of construction, some *dicta* of the court in the case of *Marbury* v. *Madison.*

It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connexion with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

In the case of *Marbury* v. *Madison*, the single question before the court, so far as that case can be applied to this, was whether the legislature could give this court original jurisdiction in a case in which the constitution had clearly not given it, and in which no doubt respecting the construction of the article could possibly be raised. The court decided, and, we think, very properly, that the legislature could not give original jurisdiction in such a case. But in the reasoning of the court in support of this decision some expressions are used which go far beyond it. The counsel for Marbury had insisted on the unlimited discretion of the legislature in the apportionment of

6 Wh. 399.

the judicial power; and it is against this argument that the reasoning of the court is directed. They say, that, if such had been the intention of the article, "it would certainly have been useless to proceed farther than to define the judicial power, and the tribunals in which it should be vested." The court says that such a construction would render the clause, dividing the jurisdiction of the court into original and appellate, totally useless; that "affirmative words are often, in their operation, negative of other objects than those which are affirmed; and in this case (in the case of *Marbury* v. *Madison*) a negative or exclusive sense must be given to them, or they have no operation at all." "It cannot be presumed," adds the court, "that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it."

The whole reasoning of the court proceeds upon the idea that the affirmative words of the clause, giving one sort of jurisdiction, must imply a negative of any other sort of jurisdiction, because otherwise the words would be totally inoperative; and this reasoning is advanced in a case to which it was strictly applicable. If in that case original jurisdiction could have been exercised, the clause under consideration would have been entirely useless. Having such cases only in its view, the court lays down a principle which is generally correct, in terms much broader than the decision, and not only much broader than the reasoning with which that decision is supported, but in some instances contradictory to its principle. The reasoning sustains the negative operation of the words in that case, because otherwise the clause would have no meaning whatever, and because such operation was necessary to give effect to the intention of the article. The effort now made is, to apply the conclusion to which the court was conducted by that reasoning in the particular case, to one in which the words have their full operation when understood affirmatively, and in which the negative or exclusive sense is to be so used as to defeat some of the great objects of the article.

6 Wh. 401.

To this construction the court cannot give its assent. The general expressions in the case of *Marbury* v. *Madison* must be understood with the limitations which are given to them in this opinion; limitations which in no degree affect the decision in that case, or the tenor of its reasoning.

The counsel who closed the argument put several cases for the purpose of illustration, which he supposed to arise under the constitution, and yet to be apparently without the jurisdiction of the court.

Were a state to lay a duty on exports, to collect the money and place it in her treasury, could the citizen who paid it, he asks, maintain a suit in this court against such state, to recover back the money?

Perhaps not. Without, however, deciding such supposed case, we may say that it is entirely unlike that under consideration.

The citizen who has paid his money to his state under a law that is void is in the same situation with every other person who has paid money by mistake. The law raises an assumpsit to return the money, and it is upon that assumpsit that the action is to be maintained. To refuse to comply with this assumpsit may be no more a violation of the constitution than to refuse to comply with any other; and as the federal courts never had jurisdiction over contracts between a state and its citizens, they may have none over this. But let us so vary the supposed case as to give it a real resemblance to that under consideration. Suppose a citizen to refuse to pay this export duty, and a suit to be instituted for the purpose of compelling him to pay it. He pleads the constitution of the United States in bar of the action, notwithstanding which the court gives judgment against him. This would be a case arising under the constitution, and would be the very case now before the court.

We are also asked, if a state should confiscate property secured by a treaty, whether the individual could maintain an action for that property.

If the property confiscated be debts, our own experience informs us that the remedy of the creditor against his debtor

6 Wh. 402.

remains. If it be land which is secured, by a treaty, and afterwards confiscated by a state, the argument does not assume that this title, thus secured, could be extinguished by an act of confiscation. The injured party, therefore, has his remedy against the occupant of the land for that which the treaty secures to him, not against the state for money which is not secured to him.

The case of a state which pays off its own debts with paper money no more resembles this than do those to which we have already adverted. The courts have no jurisdiction over the contract. They cannot enforce it, nor judge of its violation. Let it be that the act discharging the debt is a mere nullity, and that it is still due. Yet the federal courts have no cognizance of the case. But suppose a state to institute proceedings against an individual, which depended on the validity of an act emitting bills of credit; suppose a state to prosecute one of its citizens for refusing paper money, who should plead the constitution in bar of such prosecution. If his plea should be overruled, and judgment rendered against him, his case would resemble this; and unless the jurisdiction of this court might be exercised over it, the constitution would be violated, and the injured party be unable to bring his case before that tribunal to which the people of the United States have assigned all such cases.

It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in *all* cases arising

6 Wh. 403.

under the constitution and laws of the United States. We find no exception to this grant, and we cannot insert one.

To escape the operation of these comprehensive words, the counsel for the defendant has mentioned instances, in which the constitution might be violated without giving jurisdiction to this court. These words, therefore, however universal in their expression, must, he contends, be limited and controlled in their construction by circumstances. One of these instances is the grant by a state of a patent of nobility. The court, he says, cannot annul this grant.

This may be very true, but by no means justifies the inference drawn from it. The article does not extend the judicial power to every violation of the constitution which may possibly take place, but to "a case in law or equity" in which a right under such law is asserted in a court of justice. If the question cannot be brought into a court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. But if, in any controversy depending in a court, the cause should depend on the validity of such a law, that would be a case arising under the constitution, to which the judicial power of the United States would extend. The same observation applies to the other instances with which the counsel who opened the cause has illustrated this argument. Although they show that there may be violations of the constitution of which the courts can take no cognizance, they do not show that an interpretation more restrictive than the words themselves import ought to be given to this article. They do not show that there can be "a *case* in law or equity," arising under the constitution, to which the judicial power does not extend.

We think, then, that, as the constitution originally stood, the appellate jurisdiction of this court, in all cases arising under the constitution, laws, or treaties of the United States, was not arrested by the circumstance that a state was a party.

This leads to a consideration of the eleventh amendment.

It is in these words: "The judicial power of the United States shall not be construed to extend to any suit in law or equity

6 Wh. 405.

commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

It is a part of our history, that, at the adoption of the constitution, all the states were greatly indebted; and the apprehension that these debts might be prosecuted in the federal courts formed a very serious objection to that instrument. Suits were instituted, and the court maintained its jurisdiction. The alarm was general; and to quiet the apprehensions that were so extensively entertained, this amendment was proposed in congress, and adopted by the state legislatures. That its motive was not to maintain the sovereignty of a state from the degradation supposed to attend a compulsory appearance before the tribunal of the nation may be inferred from the terms of the amendment. It does not comprehend controversies between two or more states, or between a state and a foreign state. The jurisdiction of the court still extends to these cases; and in these a state may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a state. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a state, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister states would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by states.

The first impression made on the mind by this amendment is that it was intended for those cases, and for those only, in which some demand against a state is made by an individual in the courts of the union. If we consider the causes to which it is to be traced, we are conducted to the same conclusion. A general interest might well be felt in leaving to a state the full power of consulting its convenience in the adjustment of its

debts, or of other claims upon it; but no interest could be felt in so changing the relations between the whole and its parts as to strip the government of the means of protecting, by the instrumentality of its courts, the constitution and laws from active violation.

The words of the amendment appear to the court to justify and require this construction. The judicial power is not "to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state," &c.

What is a suit? We understand it to be the prosecution or pursuit of some claim, demand, or request. In law language it is the prosecution of some demand in a court of justice. The remedy for every species of wrong is, says Judge Blackstone, "the being put in possession of that right whereof the party injured is deprived." "The instruments whereby this remedy is obtained are a diversity of suits and actions, which are defined by the Mirror to be the 'lawful demand of one's right.' Or, as Bracton and Fleta express it, in the words of Justinian, '*jus prosequendi in judicio quod alicui debetur.*'" Blackstone then proceeds to describe every species of remedy by suit; and they are all cases where the party suing claims to obtain something to which he has a right.

To commence a suit is to demand something by the institution of process in a court of justice; and to prosecute the suit is, according to the common acceptation of language, to continue that demand. By a suit commenced by an individual against a state we should understand process sued out by that individual against the state, for the purpose of establishing some claim against it by the judgment of a court; and the prosecution of that suit is its continuance. Whatever may be the stages of its progress, the actor is still the same. Suits had been commenced in the supreme court against some of the states before this amendment was introduced into congress, and others might be commenced before it should be adopted by the state legislatures, and might be depending at the time of its adoption. The object of the amendment was not only to prevent the commencement of future suits, but to arrest the prosecution of those whic

6 Wh. 407.

might be commenced when this article should form a part of the constitution. It therefore embraces both objects; and its meaning is, that the judicial power shall not be construed to extend to any suit which may be commenced, or which, if already commenced, may be prosecuted against a state by the citizen of another state. If a suit brought in one court, and carried by legal process to a supervising court, be a continuation of the same suit, then this suit is not commenced nor prosecuted against a state. It is clearly, in its commencement, the suit of a state against an individual, which suit is transferred to this court, not for the purpose of asserting any claim against the state, but for the purpose of asserting a constitutional defence against a claim made by a state.

A writ of error is defined to be a commission by which the judges of one court are authorized to examine a record upon which a judgment was given in another court, and, on such examination, to affirm or reverse the same according to law. "If," says my Lord Coke, "by the writ of error the plaintiff may recover or be restored to anything, it may be released by the name of an action." In Bacon's Abridgment, tit. *Error*, L. it is laid down, that, "where by a writ of error the plaintiff shall recover or be restored to any personal thing, as debt, damage, or the like, a release of all actions personal is a good plea; and when land is to be recovered or restored in a writ of error, a release of actions real is a good bar; but where by a writ of error the plaintiff shall not be restored to any personal or real thing, a release of all actions, real or personal, is no bar." And for this we have the authority of Lord Coke, both in his Commentary on Littleton and in his Reports. A writ of error, then, is in the nature of a suit or action, when it is to restore the party who obtains it to the possession of anything which is withheld from him, not when its operation is entirely defensive.

This rule will apply to writs of error from the courts of the United States, as well as to those writs in England.

Under the judiciary act the effect of a writ of error is simply to bring the record into court, and submit the judgment of the

6 Wh. 409.

inferior tribunal to re-examination. It does not in any manner act upon the parties; it acts only on the record. It removes the record into the supervising tribunal. Where, then, a state obtains a judgment against an individual, and the court rendering such judgment overrules a defence set up under the constitution or laws of the United States, the transfer of this record into the supreme court, for the sole purpose of inquiring whether the judgment violates the constitution or laws of the United States, can with no propriety, we think, be denominated a suit commenced or prosecuted against the state whose judgment is so far re-examined. Nothing is demanded from the state. No claim against it of any description is asserted or prosecuted. The party is not to be restored to the possession of anything. Essentially, it is an appeal on a single point; and the defendant who appeals from a judgment rendered against him is never said to commence or prosecute a suit against the plaintiff who has obtained the judgment. The writ of error is given rather than an appeal, because it is the more usual mode of removing suits at common law; and because, perhaps, it is more technically proper where a single point of law, and not the whole case, is to be re-examined. But an appeal might be given, and might be so regulated, as to effect every purpose of a writ of error. The mode of removal is form, and not substance. Whether it be by writ of error, or appeal, no claim is asserted, no demand is made, by the original defendant; he only asserts the constitutional right to have his defence examined by that tribunal whose province it is to construe the constitution and laws of the union.

The only part of the proceeding which is in any manner personal is the citation. And what is the citation? It is simply notice to the opposite party that the record is transferred into another court, where he may appear or decline to appear, as his judgment or inclination may determine. As the party who has obtained a judgment is out of court, and may, therefore, not know that his cause is removed, common justice requires that notice of the fact should be given him. But this notice is not a suit, nor has it the effect of process. If the [illegible] not

6 Wh. 410.

choose to appear, he cannot be brought into court, nor is his failure to appear considered as a default. Judgment cannot be given against him for his non-appearance, but the judgment is to be re-examined, and reversed or affirmed, in like manner as if the party had appeared and argued his cause.

The point of view, in which this writ of error, with its citation, has been considered uniformly in the courts of the union, has been well illustrated by a reference to the course of this court in suits instituted by the United States. The universally received opinion is that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits. Yet writs of error, accompanied with citations, have uniformly issued for the removal of judgments in favor of the United States into a superior court, where they have, like those in favor of an individual, been re-examined, and affirmed or reversed. It has never been suggested that such writ of error was a suit against the United States, and therefore not within the jurisdiction of the appellate court.

It is, then, the opinion of the court that the defendant, who removes a judgment rendered against him by a state court into this court, for the purpose of re-examining the question, whether that judgment be in violation of the constitution or laws of the United States, does not commence or prosecute a suit against the state, whatever may be its opinion, where the effect of the writ may be to restore the party to the possession of a thing which he demands.

But should we in this be mistaken, the error does not affect the case now before the court. If this writ of error be a suit in the sense of the eleventh amendment, it is not a suit commenced or prosecuted "by a citizen of another state, or by a citizen or subject of any foreign state." It is not, then, within the amendment, but is governed entirely by the constitution as originally framed; and we have already seen that in its origin the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties.

6 Wh. 411.

2d. The second objection to the jurisdiction of the court is that its appellate power cannot be exercised, in any case, over the judgment of a state court.

This objection is sustained chiefly by arguments drawn from the supposed total separation of the judiciary of a state from that of the union, and their entire independence of each other. The argument considers the federal judiciary as completely foreign to that of a state, and as being no more connected with it, in any respect whatever, than the court of a foreign state. If this hypothesis be just, the argument founded on it is equally so; but if the hypothesis be not supported by the constitution, the argument fails with it.

This hypothesis is not founded on any words in the constitution which might seem to countenance it, but on the unreasonableness of giving a contrary construction to words which seem to require it, and on the incompatibility of the application of the appellate jurisdiction to the judgments of state courts with that constitutional relation which subsists between the government of the union and the governments of those states which compose it.

Let this unreasonableness, this total incompatibility, be examined.

That the United States form, for many and for most important purposes, a single nation has not yet been denied. In war we are one people. In making peace we are one people. In all commercial regulations we are one and the same people. In many other respects the American people are one. And the government which is alone capable of controlling and managing their interests in all these respects is the government of the union. It is their government, and in that character they have no other. America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes her government is complete; to all these objects it is competent. The people have declared that in the exercise of all powers given for these objects it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the Ameri-

6 Wh. 413.

can territory. The constitution and laws of a state, so far as they are repugnant to the constitution and laws of the United States, are absolutely void. These states are constituent parts of the United States. They are members of one great empire,—for some purposes sovereign, for some purposes subordinate.

In a government so constituted is it unreasonable that the judicial power should be competent to give efficacy to the constitutional laws of the legislature? That department can decide on the validity of the constitution or law of a state, if it be repugnant to the constitution or to a law of the United States. Is it unreasonable that it should also be empowered to decide on the judgment of a state tribunal enforcing such unconstitutional law? Is it so very unreasonable as to furnish a justification for controlling the words of the constitution?

We think it is not. We think, that, in a government acknowledgedly supreme with respect to objects of vital interest to the nation, there is nothing inconsistent with sound reason, nothing incompatible with the nature of government, in making all its departments supreme, so far as respects those objects, and so far as is necessary to their attainment. The exercise of the appellate power over those judgments of the state tribunals, which may contravene the constitution or laws of the United States, is, we believe, essential to the attainment of those objects.

The propriety of entrusting the construction of the constitution, and laws made in pursuance thereof, to the judiciary of the union, has not, we believe, as yet been drawn into question. It seems to be a corollary from this political axiom, that the federal courts should either possess exclusive jurisdiction in such cases, or a power to revise the judgment rendered in them by the state tribunals. If the federal and state courts have concurrent jurisdiction in all cases arising under the constitution, laws, and treaties of the United States; and if a case of this description brought in a state court cannot be removed before judgment, nor revised after judgment, then the construction of the constitution, laws, and treaties of the United States is not confided particularly to their judicial department, but is

6 Wh. 414.

confided equally to that department, and to the state courts, however they may be constituted. "Thirteen independent courts," says a very celebrated statesman, (and we have now more than twenty such courts) "of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed."

Dismissing the unpleasant suggestion that any motives, which may not be fairly avowed, or which ought not to exist, can ever influence a state or its courts, the necessity of uniformity, as well as correctness, in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved.

We are not restrained, then, by the political relations between the general and state governments, from construing the words of the constitution, defining the judicial power, in their true sense. We are not bound to construe them more restrictively than they naturally import.

They give to the supreme court appellate jurisdiction in all cases arising under the constitution, laws, and treaties of the United States. The words are broad enough to comprehend all cases of this description, in whatever court they may be decided. In expounding them we may be permitted to take into view those considerations to which courts have always allowed great weight in the exposition of laws.

The framers of the constitution would naturally examine the state of things existing at the time; and their work sufficiently attests that they did so. All acknowledge that they were convened for the purpose of strengthening the confederation by enlarging the powers of the government, and by giving efficacy to those which it before possessed, but could not exercise. They inform us themselves, in the instrument they presented to the American public, that one of its objects was to form a more perfect union. Under such circumstances we certainly should not expect to find in that instrument a diminution of the powers of the actual government.

6 Wh. 416.

Previous to the adoption of the confederation congress established courts which received appeals in prize causes decided in the courts of the respective states. This power of the government, to establish tribunals for these appeals, was thought consistent with, and was founded on, its political relations with the states. These courts did exercise appellate jurisdiction over those cases decided in the state courts to which the judicial power of the federal government extended.

The confederation gave to congress the power "of establishing courts for receiving and determining finally appeals in all cases of captures."

This power was uniformly construed to authorize those courts to receive appeals from the sentences of state courts, and to affirm or reverse them. State tribunals are not mentioned; but this clause in the confederation necessarily comprises them. Yet the relation between the general and state governments was much weaker, much more lax, under the confederation, than under the present constitution; and the states being much more completely sovereign, their institutions were much more independent.

The convention which framed the constitution, on turning their attention to the judicial power, found it limited to a few objects, but exercised, with respect to some of those objects, in its appellate form, over the judgments of the state courts. They extend it, among other objects, to all cases arising under the constitution, laws, and treaties of the United States; and in a subsequent clause declare that in such cases the supreme court shall exercise appellate jurisdiction. Nothing seems to be given which would justify the withdrawal of a judgment rendered in a state court, on the constitution, laws, or treaties of the United States, from this appellate jurisdiction.

Great weight has always been attached, and very rightly attached, to contemporaneous exposition. No question, it is believed, has risen to which this principle applies more unequivocally than to that now under consideration.

The opinion of the Federalist has always been considered as

of great authority. It is a complete commentary on our constitution; and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank; and the part two of its authors performed in framing the constitution put it very much in their power to explain the views with which it was framed. These essays having been published while the constitution was before the nation for adoption or rejection, and having been written in answer to objections founded entirely on the extent of its powers, and on its diminution of state sovereignty, are entitled to the more consideration where they frankly avow that the power objected to is given, and defend it.

In discussing the extent of the judicial power, the Federalist says, "Here another question occurs: What relation would subsist between the national and state courts in these instances of concurrent jurisdiction? I answer, that an appeal would certainly lie from the latter to the supreme court of the United States. The constitution in direct terms gives an appellate jurisdiction to the supreme court in all the enumerated cases of federal cognizance in which it is not to have an original one, without a single expression to confine its operation to the inferior federal courts. The objects of appeal, not the tribunals from which it is to be made, are alone contemplated. From this circumstance, and from the reason of the thing, it ought to be construed to extend to the state tribunals. Either this must be the case, or the local courts must be excluded from a concurrent jurisdiction in matters of national concern, else the judicial authority of the union may be eluded at the pleasure of every plaintiff or prosecutor. Neither of these consequences ought, without evident necessity, to be involved; the latter would be entirely inadmissible, as it would defeat some of the most important and avowed purposes of the proposed government, and would essentially embarrass its measures. Nor do I perceive any foundation for such a supposition. Agreeably to the remark already made, the national and state systems are to be regarded as one whole. The courts of the latter will of

6 Wh. 418.

course be natural auxiliaries to the execution of the laws of the union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of natural justice and the rules of natural decision. The evident aim of the plan of the national convention is that all the causes of the specified classes shall, for weighty public reasons, receive their original or final determination in the courts of the union. To confine, therefore, the general expressions, which give appellate jurisdiction to the supreme court, to appeals from the subordinate federal courts, instead of allowing their extension to the state courts, would be to abridge the latitude of the terms, in subversion of the intent, contrary to every sound rule of interpretation."

A contemporaneous exposition of the constitution, certainly of not less authority than that which has been just cited, is the judiciary act itself. We know that in the congress which passed that act were many eminent members of the convention which formed the constitution. Not a single individual, so far as is known, supposed that part of the act, which gives the supreme court appellate jurisdiction over the judgments of the state courts in the cases therein specified, to be unauthorized by the constitution.

While on this part of the argument, it may be also material to observe that the uniform decisions of this court on the point now under consideration have been assented to, with a single exception, by the courts of every state in the union whose judgments have been revised. It has been the unwelcome duty of this tribunal to reverse the judgments of many state courts in cases in which the strongest state feelings were engaged. Judges, whose talents and character would grace any bench, to whom a disposition to submit to jurisdiction that is usurped, or to surrender their legitimate powers, will certainly not be imputed, have yielded without hesitation to the authority by which their judgments were reversed, while they, perhaps, disapproved the judgment of reversal.

This concurrence of statesmen, of legislators, and of judges,

6 Wh. 420.

in the same construction of the constitution, may justly inspire some confidence in that construction.

In opposition to it, the counsel who made this point has presented in a great variety of forms the idea already noticed, that the federal and state courts must, of necessity, and from the nature of the constitution, be in all things totally distinct and independent of each other. If this court can correct the errors of the courts of Virginia, he says, it makes them courts of the United States, or becomes itself a part of the judiciary of Virginia.

But it has been already shown that neither of these consequences necessarily follows. The American people may certainly give to a national tribunal a supervising power over those judgments of the state courts which may conflict with the constitution, laws, or treaties of the United States, without converting them into federal courts, or converting the national into a state tribunal. The one court still derives its authority from the state, the other still derives its authority from the nation.

If it shall be established, he says, that this court has appellate jurisdiction over the state courts in all cases enumerated in the third article of the constitution, a complete consolidation of the states, so far as respects judicial power, is produced.

But certainly the mind of the gentleman who urged this argument is too accurate not to perceive that he has carried it too far; that the premises by no means justify the conclusion. "A complete consolidation of the states, so far as respects the judicial power," would authorize the legislature to confer on the federal courts appellate jurisdiction from the state courts in all cases whatsoever. The distinction between such a power, and that of giving appellate jurisdiction in a few specified cases in the decision of which the nation takes an interest, is too obvious not to be perceived by all.

This opinion has been already drawn out to too great a length to admit of entering into a particular consideration of the various forms in which the counsel who made this point has, with much ingenuity, presented his argument to the court. The argu-

6 Wh. 421.

ment in all its forms is essentially the same. It is founded, not on the words of the constitution, but on its spirit, a spirit extracted not from the words of the instrument, but from his view of the nature of our union, and of the great fundamental principles on which the fabric stands.

To this argument, in all its forms, the same answer may be given. Let the nature and objects of our union be considered; let the great fundamental principles on which the fabric stands be examined; and we think the result must be that there is nothing so extravagantly absurd, in giving to the court of the nation the power of revising the decisions of local tribunals on questions which affect the nation, as to require that words which import this power should be restricted by a forced construction. The question, then, must depend on the words themselves; and on their construction we shall be the more readily excused for not adding to the observations already made, because the subject was fully discussed and exhausted in the case of *Martin* v. *Hunter*.

3d. We come now to the third objection, which, though differently stated by the counsel, is substantially the same. One gentleman has said that the judiciary act does not give jurisdiction in the case.

The cause was argued in the state court, on a case agreed by the parties, which states the prosecution under a law for selling lottery tickets, which is set forth, and further states the act of congress by which the city of Washington was authorized to establish the lottery. It then states that the lottery was regularly established by virtue of the act, and concludes with referring to the court the questions, whether the act of congress be valid? whether, on its just construction, it constitutes a bar to the prosecution? and whether the act of assembly, on which the prosecution is founded, be not itself invalid? These questions were decided against the operation of the act of congress, and in favor of the operation of the act of the state.

If the twenty-fifth section of the judiciary act be inspected, it will at once be perceived that it comprehends expressly the case under consideration.

6 Wh. 422.

But it is not upon the letter of the act that the gentleman who stated this point in this form founds his argument. Both gentlemen concur substantially in their views of this part of the case. They deny that the act of congress on which the plaintiff in error relies is a law of the United States; or, if a law of the United States, is within the second clause of the sixth article.

In the enumeration of the powers of congress, which is made in the eighth section of the first article, we find that of exercising exclusive legislation over such district as shall become the seat of government. This power, like all others which are specified, is conferred on congress as the legislature of the union; for, strip them of that character, and they would not possess it. In no other character can it be exercised. In legislating for the district, they necessarily preserve the character of the legislature of the union; for it is in that character alone that the constitution confers on them this power of exclusive legislation. This proposition need not be enforced.

The second clause of the sixth article declares that "this constitution, and the laws of the United States which shall be made in pursuance thereof, shall be the supreme law of the land."

The clause which gives exclusive jurisdiction is unquestionably a part of the constitution, and as such binds all the United States. Those who contend that acts of congress made in pursuance of this power do not, like acts made in pursuance of other powers, bind the nation, ought to show some safe and clear rule which shall support this construction, and prove that an act of congress, clothed in all the forms which attend other legislative acts, and passed in virtue of a power conferred on and exercised by congress as the legislature of the union, is not a law of the United States, and does not bind them.

One of the gentlemen sought to illustrate his proposition, that congress, when legislating for the district, assumed a distinct character and was reduced to a mere local legislature, whose laws could possess no obligation out of the ten miles square, by a reference to the complex character of this court. It is, they say, a court of common law and a court of equity. Its charac-

6 Wh. 424.

ter, when sitting as a court of common law, is as distinct from its character, when sitting as a court of equity, as if the powers belonging to those departments were vested in different tribunals. Though united in the same tribunal, they are never confounded with each other.

Without inquiring how far the union of different characters in one court may be applicable, in principle, to the union in congress of the power of exclusive legislation in some places, and of limited legislation in others, it may be observed, that the forms of proceedings in a court of law are so totally unlike the forms of proceedings in a court of equity that a mere inspection of the record gives decisive information of the character in which the court sits, and consequently of the extent of its powers. But if the forms of proceeding were precisely the same, and the court the same, the distinction would disappear.

Since congress legislates in the same forms, and in the same character, in virtue of powers of equal obligation, conferred in the same instrument, when exercising its exclusive powers of legislation, as well as when exercising those which are limited, we must inquire whether there be anything in the nature of this exclusive legislation, which necessarily confines the operation of the laws made in virtue of this power to the place with a view to which they are made.

Connected with the power to legislate within this district is a similar power in forts, arsenals, dock-yards, &c. Congress has a right to punish murder in a fort, or other place, within its exclusive jurisdiction, but no general right to punish murder committed within any of the states. In the act for the punishment of crimes against the United States, murder committed within a fort, or any other place or district of country, under the sole and exclusive jurisdiction of the United States, is punished with death. Thus congress legislates in the same act, under its exclusive and its limited powers.

The act proceeds to direct that the body of the criminal, after execution, may be delivered to a surgeon for dissection, and punishes any person who shall rescue such body during its

conveyance from the place of execution to the surgeon to whom it is to be delivered.

Let these actual provisions of the law, or any other provisions which can be made on the subject, be considered with a view to the character in which congress acts when exercising its powers of exclusive legislation.

If congress is to be considered merely as a local legislature, invested, as to this object, with powers limited to the fort, or other place, in which the murder may be committed, if its general powers cannot come in aid of these local powers, how can the offence be tried in any other court than that of the place in which it has been committed? How can the offender be conveyed to, or tried in, any other place? How can he be executed elsewhere? How can his body be conveyed through a country under the jurisdiction of another sovereign, and the individual punished, who, within that jurisdiction, shall rescue the body?

Were any one state of the union to pass a law for trying a criminal in a court not created by itself, in a place not within its jurisdiction, and direct the sentence to be executed without its territory, we should all perceive and acknowledge its incompetency to such a course of legislation. If congress be not equally incompetent, it is because that body unites the powers of local legislation with those which are to operate through the union, and may use the last in aid of the first; or because the power of exercising exclusive legislation draws after it, as an incident, the power of making that legislation effectual, and the incidental power may be exercised throughout the union, because the principal power is given to that body as the legislature of the union.

So, in the same act, a person who, having knowledge of the commission of murder, or other felony, on the high seas, or within any fort, arsenal, dock-yard, magazine, or other place or district of country, within the sole and exclusive jurisdiction of the United States, shall conceal the same, &c., he shall be adjudged guilty of misprison of felony, and shall be adjudged to be imprisoned, &c.

6 Wh. 427.

It is clear that congress cannot punish felonies generally, and, of consequence, cannot punish misprison of felony. It is equally clear that a state legislature, the state of Maryland, for example, cannot punish those who, in another state, conceal a felony committed in Maryland. How, then, is it that congress, legislating exclusively for a fort, punishes those who, out of that fort, conceal a felony committed within it?

The solution and the only solution of the difficulty is that the power vested in congress, as the legislature of the United States, to legislate exclusively within any place ceded by a state, carries with it, as an incident, the right to make that power effectual. If a felon escape out of the state in which the act has been committed, the government cannot pursue him into another state, and apprehend him there, but must demand him from the executive power of that other state. If congress were to be considered merely as the local legislature for the fort, or other place in which the offence might be committed, then this principle would apply to them as to other local legislatures; and the felon, who should escape out of the fort, or other place, in which the felony may have been committed, could not be apprehended by the marshal, but must be demanded from the executive of the state. But we know that the principle does not apply; and the reason is that congress is not a local legislature, but exercises this particular power, like all its other powers, in its high character as the legislature of the union. The American people thought it a necessary power, and they conferred it for their own benefit. Being so conferred, it carries with it all those incidental powers which are necessary to its complete and effectual execution.

Whether any particular law be designed to operate without the district or not depends on the words of that law. If it be designed so to operate, then the question, whether the power so exercised be incidental to the power of exclusive legislation, and be warranted by the constitution, requires a consideration of that instrument. In such cases the constitution and the law must be compared and construed. This is the exercise of

jurisdiction. It is the only exercise of it which is allowed in such a case. For the act of congress directs that "no other error shall be assigned or regarded as a ground of reversal, in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties," &c.

The whole merits of this case, then, consist in the construction of the constitution and the act of congress. The jurisdiction of the court, if acknowledged, goes no farther. This we are required to do without the exercise of jurisdiction.

The counsel for the state of Virginia have, in support of this motion, urged many arguments of great weight against the application of the act of congress to such a case as this; but those arguments go to the construction of the constitution, or of the law, or of both, and seem, therefore, rather calculated to sustain their cause upon its merits than to prove a failure of jurisdiction in the court.

After having bestowed upon this question the most deliberate consideration of which we are capable, the court is unanimously of opinion that the objections to its jurisdiction are not sustained, and that the motion ought to be overruled.

Motion denied.

6 Wh. 429.

JOHNSON AND GRAHAM'S LESSEE *v.* M'INTOSH.

FEBRUARY TERM, 1823.

[8 Wheaton's Reports, 543–605.]

Johnson sued M'Intosh in the United States district court of Illinois for certain lands, claimed by Johnson under a private purchase from the Indians, while M'Intosh held under the United States. Judgment being given for the defendant, Johnson brought it up on a writ of error.

Chief Justice Marshall delivered the opinion of the court as follows :—

The plaintiffs in this cause claim the land, in their declaration mentioned, under two grants, purporting to be made, the first in 1773, and the last in 1775, by the chiefs of certain Indian tribes constituting the Illinois and the Piankeshaw nations; and the question is, whether this title can be recognized in the courts of the United States.

The facts, as stated in the case agreed, show the authority of the chiefs who executed this conveyance, so far as it could be given by their own people; and likewise show that the particular tribes for whom these chiefs acted were in rightful possession of the land they sold. The inquiry, therefore, is, in a great measure, confined to the power of Indians to give, and of private individuals to receive, a title which can be sustained in the courts of this country.

As the right of society to prescribe those rules by which property may be acquired and preserved is not, and cannot be, drawn into question; as the title to lands, especially, is and must be admitted to depend entirely on the law of the nation in which they lie; it will be necessary, in pursuing this inquiry, to examine, not singly those principles of abstract justice which

the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations whose perfect independence is acknowledged; but those principles, also, which our own government has adopted in the particular case, and given us as the rule for our decision.

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new by bestowing on them civilization and Christianity, in exchange for unlimited independence. But as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle which all should acknowledge as the law, by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments, which title might be consummated by possession.

The exclusion of all other Europeans necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which by others all assented.

Those relations which were to exist between the discoverer and the natives were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

In the establishment of these relations the rights of the origi-

8 Wh. 573.

nal inhabitants were in no instance entirely disregarded, but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil, at their own will, to whomsoever they pleased, was denied by the original, fundamental principle that discovery gave exclusive title to those who made it.

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy.

The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles.

Spain did not rest her title solely on the grant of the pope. Her discussions, respecting boundary, with France, with Great Britain, and with the United States, all show that she placed it on the rights given by discovery. Portugal sustained her claim to the Brazils by the same title.

France, also, founded her title to the vast territories she claimed in America on discovery. However conciliatory her conduct to the natives may have been, she still asserted her right of dominion over a great extent of country not actually settled by Frenchmen, and her exclusive right to acquire and dispose of the soil which remained in the occupation of Indians. Her monarch claimed all Canada and Acadie, as colonies of France, at a time when the French population was very inconsiderable, and the Indians occupied almost the whole country. He also claimed Louisiana, comprehending the immense territories watered by the Mississippi and the rivers which empty into

it, by the title of discovery. The letters patent granted to the Sieur Demonts, in 1603, constitute him lieutenant general, and the representative of the king in Acadie, which is described as stretching from the fortieth to the forty-sixth degree of north latitude; with authority to extend the power of the French over that country and its inhabitants, to give laws to the people, to treat with the natives, and enforce the observance of treaties, and to parcel out and give title to lands according to his own judgment.

The states of Holland also made acquisitions in America, and sustained their right on the common principle adopted by all Europe. They allege, as we are told by Smith, in his History of New York, that Henry Hudson, who sailed, as they say, under the orders of their East-India Company, discovered the country from the Delaware to the Hudson, up which he sailed to the forty-third degree of north latitude; and this country they claimed under the title acquired by this voyage. Their first object was commercial, as appears by a grant made to a company of merchants in 1614; but in 1621 the States General made, as we are told by Mr. Smith, a grant of the country to the West-India Company, by the name of New Netherlands.

The claim of the Dutch was always contested by the English; not because they questioned the title given by discovery, but because they insisted on being themselves the rightful claimants under that title. Their pretensions were finally decided by the sword.

No one of the powers of Europe gave its full assent to this principle more unequivocally than England. The documents upon this subject are ample and complete. So early as the year 1496 her monarch granted a commission to the Cabots to discover countries then unknown to *Christian people*, and to take possession of them in the name of the king of England. Two years afterwards Cabot proceeded on this voyage, and discovered the continent of North America, along which he sailed as far south as Virginia. To this discovery the English trace their title.

8 Wh. 576.

In this first effort made by the English government to acquire territory on this continent we perceive a complete recognition of the principle which has been mentioned. The right of discovery given by this commission is confined to countries "then unknown to all Christian people;" and of these countries Cabot was empowered to take possession in the name of the king of England. Thus asserting a right to take possession, notwithstanding the occupancy of the natives, who were heathens, and, at the same time, admitting the prior title of any Christian people who may have made a previous discovery.

The same principle continued to be recognized. The charter granted to Sir Humphrey Gilbert, in 1578, authorizes him to discover and take possession of such remote, heathen, and barbarous lands as were not actually possessed by any Christian prince or people. This charter was afterwards renewed to Sir Walter Raleigh, in nearly the same terms.

By the charter of 1606, under which the first permanent English settlement on this continent was made, James I. granted to Sir Thomas Gates and others those territories in America lying on the sea-coast, between the thirty-fourth and forty-fifth degrees of north latitude, and which either belonged to that monarch, or were not then possessed by any other Christian prince or people. The grantees were divided into two companies at their own request. The first or southern colony was directed to settle between the thirty-fourth and forty-first degrees of north latitude; and the second or northern colony, between the thirty-eighth and forty-fifth degrees.

In 1609, after some expensive and not very successful attempts at settlement had been made, a new and more enlarged charter was given by the crown to the first colony, in which the king granted to the "Treasurer and Company of Adventurers of the City of London for the first Colony in Virginia," in absolute property, the lands extending along the sea-coast four hundred miles, and into the land throughout from sea to sea. This charter, which is a part of the special verdict in this cause, was annulled, so far as respected the rights of the company, by the

judgment of the court of king's bench on a writ of *quo warranto;* but the whole effect allowed to this judgment was to revest in the crown the powers of government, and the title to the lands within its limits.

At the solicitation of those who held under the grant to the second or northern colony, a new and more enlarged charter was granted to the Duke of Lenox and others, in 1620, who were denominated the Plymouth Company, conveying to them, in absolute property, all the lands between the fortieth and forty-eighth degrees of north latitude.

Under this patent New England has been in a great measure settled. The company conveyed to Henry Rosewell and others, in 1627, that territory which is now Massachusetts; and in 1628, a charter of incorporation, comprehending the powers of government, was granted to the purchasers.

Great part of New England was granted by this company, which, at length, divided their remaining lands among themselves, and in 1635 surrendered their charter to the crown. A patent was granted to Gorges for Maine, which was allotted to him in the division of property.

All the grants made by the Plymouth Company, so far as we can learn, have been respected. In pursuance of the same principle, the king, in 1664, granted to the Duke of York the country of New England as far south as the Delaware bay. His royal highness transferred New Jersey to Lord Berkeley and Sir George Carteret.

In 1663, the crown granted to Lord Clarendon and others the country lying between the thirty-sixth degree of north latitude and the river St. Mathes; and in 1666 the proprietors obtained from the crown a new charter, granting to them that province in the king's dominions in North America which lies from thirty-six degrees, thirty minutes, north latitude, to the twenty-ninth degree, and from the Atlantic ocean to the South sea.

Thus has our whole country been granted by the crown while in the occupation of the Indians. These grants purport to convey the soil as well as the right of dominion to the grantees.

In those governments which were denominated royal, where the right to the soil was not vested in individuals, but remained in the crown, or was vested in the colonial government, the king claimed and exercised the right of granting lands, and of dismembering the government, at his will. The grants made out of the two original colonies, after the resumption of their charters by the crown, are examples of this. The governments of New England, New York, New Jersey, Pennsylvania, Maryland, and a part of Carolina, were thus created. In all of them, the soil, at the time the grants were made, was occupied by the Indians. Yet almost every title within those governments is dependent on these grants. In some instances the soil was conveyed by the crown unaccompained by the powers of government, as in the case of the northern neck of Virginia. It has never been objected to this, or to any other similar grant, that the title as well as possession was in the Indians when it was made, and that it passed nothing on that account.

These various patents cannot be considered as nullities; nor can they be limited to a mere grant of the powers of government. A charter, intended to convey political power only, would never contain words expressly granting the land, the soil, and the waters. Some of them purport to convey the soil alone; and in those cases in which the powers of government, as well as the soil, are conveyed to individuals, the crown has always acknowledged itself to be bound by the grant. Though the power to dismember regal governments was asserted and exercised, the power to dismember proprietary governments was not claimed; and in some instances, even after the powers of government were revested in the crown, the title of the proprietors to the soil was respected.

Charles II. was extremely anxious to acquire the property of Maine, but the grantees sold it to Massachusetts, and he did not venture to contest the right of that colony to the soil. The Carolinas were originally proprietary governments. In 1721 a revolution was effected by the people, who shook off their obedience to the proprietors, and declared their dependence

immediately on the crown. The king, however, purchased the title of those who were disposed to sell. One of them, Lord Carteret, surrendered his interest in the government, but retained his title to the soil. That title was respected till the revolution, when it was forfeited by the laws of war.

Further proofs of the extent to which this principle has been recognized will be found in the history of the wars, negotiations, and treaties, which the different nations, claiming territory in America, have carried on and held with each other.

The contests between the cabinets of Versailles and Madrid, respecting the territory on the northern coast of the gulf of Mexico, were fierce and bloody, and continued until the establishment of a Bourbon on the throne of Spain produced such amicable dispositions in the two crowns as to suspend or terminate them.

Between France and Great Britain, whose discoveries as well as settlements were nearly contemporaneous, contests for the country, actually covered by the Indians, began as soon as their settlements approached each other, and were continued until finally settled in the year 1763 by the treaty of Paris.

Each nation had granted and partially settled the country denominated by the French, Acadie, and by the English, Nova Scotia. By the twelfth article of the treaty of Utrecht, made in 1703, his most Christian Majesty ceded to the Queen of Great Britain, "all Nova Scotia or Acadie, with its ancient boundaries." A great part of the ceded territory was in the possession of the Indians, and the extent of the cession could not be adjusted by the commissioners to whom it was to be referred.

The treaty of Aix la Chapelle, which was made on the principle of the *status ante bellum*, did not remove this subject of controversy. Commissioners for its adjustment were appointed, whose very able and elaborate, though unsuccessful arguments, in favor of the title of their respective sovereigns, show how entirely each relied on the title given by discovery to lands remaining in the possession of Indians.

8 Wh. 581.

After the termination of this fruitless discussion the subject was transferred to Europe, and taken up by the cabinets of Versailles and London. This controversy embraced not only the boundaries of New England, Nova Scotia, and that part of Canada which adjoined those colonies, but embraced our whole western country also. France contended not only that the St. Lawrence was to be considered as the centre of Canada, but that the Ohio was within that colony. She founded this claim on discovery, and on having used that river for the transportation of troops in a war with some southern Indians.

This river was comprehended in the chartered limits of Virginia; but though the right of England to a reasonable extent of country, in virtue of her discovery of the sea-coast, and of the settlements she made on it, was not to be questioned; her claim of all the lands to the Pacific ocean, because she had discovered the country washed by the Atlantic, might, without derogating from the principle recognized by all, be deemed extravagant. It interfered, too, with the claims of France, founded on the same principle. She, therefore, sought to strengthen her original title to the lands in controversy, by insisting that it had been acknowledged by France in the fifteenth article of the treaty of Utrecht. The dispute respecting the construction of that article has no tendency to impair the principle that discovery gave a title to lands still remaining in the possession of the Indians. Whichever title prevailed, it was still a title to lands occupied by the Indians, whose right of occupancy neither controverted, and neither had then extinguished.

These conflicting claims produced a long and bloody war, which was terminated by the conquest of the whole country east of the Mississippi. In the treaty of 1763 France ceded and guaranteed to Great Britain all Nova Scotia, or Acadie, and Canada, with their dependencies; and it was agreed that the boundaries between the territories of the two nations, in America, should be irrevocably fixed by a line drawn from the source of the Mississippi, through the middle of that river and

8 Wh. 582.

the lakes Maurepas and Ponchartrain, to the sea. This treaty expressly cedes, and has always been understood to cede, the whole country on the English side of the dividing line between the two nations, although a great and valuable part of it was occupied by the Indians. Great Britain, on her part, surrendered to France all her pretensions to the country west of the Mississippi. It has never been supposed that she surrendered nothing, although she was not in actual possession of a foot of land. She surrendered all right to acquire the country; and any after attempt to purchase it from the Indians would have been considered and treated as an invasion of the territories of France.

By the twentieth article of the same treaty Spain ceded Florida, with its dependencies, and all the country she claimed east or southeast of the Mississippi, to Great Britain. Great part of this territory also was in possession of the Indians.

By a secret treaty, which was executed about the same time, France ceded Louisiana to Spain; and Spain has since retroceded the same country to France. At the time both of its cession and retrocession it was occupied chiefly by the Indians.

Thus all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognized in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians. Have the American states rejected or adopted this principle?

By the treaty which concluded the war of our revolution Great Britain relinquished all claim, not only to the government, but to the "proprietary and territorial rights, of the United States," whose boundaries were fixed in the second article. By this treaty the powers of government, and the right to soil, which had previously been in Great Britain, passed definitively to these states. We had before taken possession of them, by declaring independence; but neither the declaration of independence, nor the treaty confirming it, could give us more than that which we before possessed, or to which Great Britain was before entitled. It has never been doubted that either the United

States, or the several states, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right was vested in that government which might constitutionally exercise it.

Virginia, particularly, within whose chartered limits the land in controversy lay, passed an act, in the year 1779, declaring her "exclusive right of pre-emption from the Indians of all the lands within the limits of her own chartered territory, and that no person or persons whatsoever have, or ever had, a right to purchase any lands within the same from any Indian nation, except only persons duly authorized to make such purchase, formerly for the use and benefit of the colony, and lately for the commonwealth." The act then proceeds to annul all deeds made by Indians to individuals for the private use of the purchasers.

Without ascribing to this act the power of annulling vested rights, or admitting it to countervail the testimony furnished by the marginal note opposite to the title of the law forbidding purchases from the Indians, in the revisals of the Virginia statutes, stating that law to be repealed, it may safely be considered as an unequivocal affirmance, on the part of Virginia, of the broad principle which had always been maintained, that the exclusive right to purchase from the Indians resided in the government.

In pursuance of the same idea, Virginia proceeded, at the same session, to open her land office, for the sale of that country which now constitutes Kentucky, a country, every acre of which was then claimed and possessed by Indians, who maintained their title with as much persevering courage as was ever manifested by any people.

The states, having within their chartered limits different portions of territory covered by Indians, ceded that territory, generally, to the United States, on conditions expressed in their deeds of cession, which demonstrate the opinion that they ceded the soil as well as jurisdiction, and that in doing so they

granted a productive fund to the government of the union. The lands in controversy lay within the chartered limits of Virginia, and were ceded with the whole country north-west of the river Ohio. This grant contained reservations and stipulations which could only be made by the owners of the soil; and concluded with a stipulation that "all the lands in the ceded territory, not reserved, should be considered as a common fund, for the use and benefit of such of the United States as have become, or shall become, members of the confederation," &c., "according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatsoever."

The ceded territory was occupied by numerous and warlike tribes of Indians; but the exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted.

After these states became independent a controversy subsisted between them and Spain respecting boundary. By the treaty of 1795 this controversy was adjusted, and Spain ceded to the United States the territory in question. This territory, though claimed by both nations, was chiefly in the actual occupation of Indians.

The magnificent purchase of Louisiana was the purchase from France of a country almost entirely occupied by numerous tribes of Indians, who are, in fact, independent. Yet any attempt of others to intrude into that country would be considered as an aggression which would justify war.

Our late acquisitions from Spain are of the same character; and the negotiations which preceded those acquisitions recognize and elucidate the principle which has been received as the foundation of all European title in America.

The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold and assert in themselves the title by which it was acquired. They maintain, as all others have main-

8 Wh. 586.

tained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise.

The power, now possessed by the government of the United States, to grant lands, resided, while we were colonies, in the crown, or its grantees. The validity of the titles given by either has never been questioned in our courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute must be an exclusive title, or, at least, a title which excludes all others not compatible with it. All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognize the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.

We will not enter into the controversy, whether agriculturists, merchants, and manufacturers have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be respecting the original justice of the claim which has been successfully asserted. The British government, which was then our government, and whose rights have passed to the United States, asserted a title to all the lands occupied by Indians within the chartered limits of the British colonies. It asserted, also, a limited sovereignty over them, and the exclusive right of extinguishing the title which occupancy gave to them. These claims have been maintained and established, as far west as the river Mississippi, by the sword. The title to a vast portion of the lands we now hold originates in them. It is not for the courts of this country to question the validity of this title, or to sustain one which is incompatible with it.

8 Wh. 588.

Although we do not mean to engage in the defence of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them.

The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually they are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected. The new and old members of the society mingle with each other, the distinction between them is gradually lost, and they make one people. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old; and that confidence in their security should gradually banish the painful sense of being separated from their ancient connexions, and united by force to strangers.

When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, or safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he cannot neglect them without injury to his fame, and hazard to his power.

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them possession of their country was to leave the country a wilderness; to govern them as a distinct people was impossible, because they were as brave and as high-spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

What was the inevitable consequence of this state of things?

The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it; or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society; or of remaining in their neighborhood, and exposing themselves and their families to the perpetual hazard of being massacred.

Frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued. European policy, numbers, and skill prevailed. As the white population advanced, that of the Indians necessarily receded. The country in the immediate neighborhood of agriculturists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed. The soil, to which the crown originally claimed title, being no longer occupied by its ancient inhabitants, was parcelled out according to the will of the sovereign power, and taken possession of by persons who claimed immediately from the crown, or mediately, through its grantees or deputies.

That law, which regulates, and ought to regulate, in general, the relations between the conqueror and conquered, was incapable of application to a people under such circumstances. The resort to some new and different rule, better adapted to the actual state of things, was unavoidable. Every rule which can be suggested will be found to be attended with great difficulty.

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it; it becomes a law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the

absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice.

This question is not entirely new in this court. The case of *Fletcher* v. *Peck* grew out of a sale made by the state of Georgia of a large tract of country within the limits of that state, the grant of which was afterwards resumed. The action was brought by a sub-purchaser, on the contract of sale, and one of the covenants in the deed was that the state of Georgia was, at the time of sale, seized in fee of the premises. The real question presented by the issue was, whether the seizin in fee was in the state of Georgia or in the United States. After stating that this controversy between the several states and the United States had been compromised, the court thought it necessary to notice the Indian title, which, although entitled to the respect of all courts, until it should be legitimately extinguished, was declared not to be such as to be absolutely repugnant to a seizin in fee on the part of the state.

This opinion conforms precisely to the principle which has been supposed to be recognized by all European governments from the first settlement of America. The absolute, ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring. Such a right is no more incompatible with a seizin in fee than a lease for years, and might as effectually bar an ejectment.

Another view has been taken of this question, which deserves to be considered. The title of the crown, whatever it might be, could be acquired only by a conveyance from the crown. If an individual might extinguish the Indian title for his own benefit, or, in other words, might purchase it, still he could acquire only that title. Admitting their power to change their laws or usages, so far as to allow an individual to separate a

8 Wh. 502.

portion of their lands from the common stock, and hold it in severalty, still, it is a part of their territory, and is held, under them, by a title dependent on their laws. The grant derives its efficacy from their will; and if they choose to resume it, and make a different disposition of the land, the courts of the United States cannot interpose for the protection of the title. The person who purchases lands from the Indians within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws. If they annul the grant, we know of no tribunal which can revise and set aside the proceeding. We know of no principle which can distinguish this case from a grant made to a native Indian, authorizing him to hold a particular tract of land in severalty.

As such a grant could not separate the Indian from his nation, nor give a title which our courts could distinguish from the title of his tribe, as it might still be conquered from or ceded by his tribe, we can perceive no legal principle which will authorize a court to say that different consequences are attached to this purchase because it was made by a stranger. By the treaties concluded between the United States and the Indian nations whose title the plaintiffs claim, the country comprehending the lands in controversy has been ceded to the United States, without any reservation of their title. These nations had been at war with the United States, and had an unquestionable right to annul any grant they had made to American citizens. Their cession of the country, without a reservation of this land, affords a fair presumption that they considered it as of no validity. They ceded to the United States this very property, after having used it, in common with other lands, as their own, from the date of their deeds to the time of cession; and the attempt now made is to set up their title against that of the United States.

The proclamation issued by the king of Great Britain, in 1763, has been considered, and, we think, with reason, as constituting an additional objection to the title of the plaintiffs.

By that proclamation the crown reserved under its own

dominion and protection, for the use of the Indians, "all the land and territories lying to the westward of the sources of the rivers which fall into the sea from the west and north-west," and strictly forbade all British subjects from making any purchases or settlements whatever, or taking possession of the reserved lands.

It has been contended that in this proclamation the king transcended his constitutional powers; and the case of *Campbell* v. *Hall* (reported by Cowper) is relied on to support this position. It is supposed to be a principle of universal law, that, if an uninhabited country be discovered by a number of individuals who acknowledge no connexion with, and owe no allegiance to, any government whatever, the country becomes the property of the discoverers, so far, at least, as they can use it. They acquire a title in common. The title of the whole land is in the whole society. It is to be divided and parcelled out according to the will of the society, expressed by the whole body, or by that organ which is authorized by the whole to express it.

If the discovery be made, and possession of the country be taken, under the authority of an existing government which is acknowledged by the emigrants, it is supposed to be equally well settled that the discovery is made for the whole nation, that the country becomes a part of the nation, and that the vacant soil is to be disposed of by that organ of the government which has the constitutional power to dispose of the national domains, by that organ in which all vacant territory is vested by law.

According to the theory of the British constitution, all vacant lands are vested in the crown, as representing the nation; and the exclusive power to grant them is admitted to reside in the crown, as a branch of the royal prerogative. It has been already shown that this principle was as fully recognized in America as in the island of Great Britain. All the lands we hold were originally granted by the crown; and the establishment of a regal government has never been considered as impairing its right

8 Wh. 595.

to grant lands within the chartered limits of such colony. In addition to the proof of this principle, furnished by the immense grants, already mentioned, of lands lying within the chartered limits of Virginia, the continuing right of the crown to grant lands lying within that colony was always admitted. A title might be obtained, either by making an entry with the surveyor of a county, in pursuance of law, or by an order of the governor in council, who was the deputy of the king, or by an immediate grant from the crown. In Virginia, therefore, as well as elsewhere in the British dominions, the complete title of the crown to vacant lands was acknowledged.

So far as respected the authority of the crown, no distinction was taken between vacant lands and lands occupied by the Indians. The title, subject only to the right of occupancy by the Indians, was admitted to be in the king, as was his right to grant that title. The lands, then, to which this proclamation referred, were lands which the king had a right to grant, or to reserve for the Indians.

According to the theory of the British constitution, the royal prerogative is very extensive, so far as respects the political relation between Great Britain and foreign nations. The peculiar situation of the Indians, necessarily considered, in some respects, as a dependent, and, in some respects as a distinct people, occupying a country claimed by Great Britain, and yet too powerful and brave not to be dreaded as formidable enemies, required that means should be adopted for the preservation of peace, and that their friendship should be secured by quieting their alarms for their property. This was to be effected by restraining the encroachments of the whites; and the power to do this was never, we believe, denied by the colonies to the crown.

In the case of *Campbell* v. *Hall*, that part of the proclamation was determined to be illegal which imposed a tax on a conquered province after a government had been bestowed upon it. The correctness of this decision cannot be questioned, but its application to the case at bar cannot be admitted. Since the

8 Wh. 596.

expulsion of the Stuart family the power of imposing taxes by proclamation has never been claimed as a branch of regal prerogative; but the powers of granting, or refusing to grant, vacant lands, and of restraining encroachments on the Indians, have always been asserted and admitted.

The authority of this proclamation, so far as it respected this continent, has never been denied, and the titles it gave to lands have always been sustained in our courts.

In the argument of this cause the counsel for the plaintiffs have relied very much on the opinions expressed by men holding offices of trust, and on various proceedings in America to sustain titles to land derived from the Indians.

The collection of claims to lands lying in the western country, made in the first volume of the laws of the United States, has been referred to; but we find nothing in that collection to support the argument. Most of the titles were derived from persons professing to act under the authority of the government existing at the time; and the two grants under which the plaintiffs claim are supposed, by the person under whose inspection the collection was made, to be void, because forbidden by the royal proclamation of 1763. It is not unworthy of remark that the usual mode adopted by the Indians for granting lands to individuals has been to reserve them in a treaty, or to grant them under the sanction of the commissioners with whom the treaty was negotiated. The practice, in such case, to grant to the crown, for the use of the individual, is some evidence of a general understanding that the validity even of such a grant depended on its receiving the royal sanction.

The controversy between the colony of Connecticut and the Mohegan Indians depended on the nature and extent of a grant made by those Indians to the colony; on the nature and extent of the reservations made by the Indians, in their several deeds and treaties, which were alleged to be recognized by the legitimate authority; and on the violation by the colony of rights thus reserved and secured. We do not perceive in that case any assertion of the principle that individuals might obtain a complete and valid title from the Indians.

8 Wh. 597.

It has been stated, that, in the memorial transmitted from the cabinet of London to that of Versailles, during the controversy between the two nations, respecting boundary, which took place in 1755, the Indian right to the soil is recognized. But this recognition was made with reference to their character as Indians, and for the purpose of showing that they were fixed to a particular territory. It was made for the purpose of sustaining the claim of his Britannic majesty to dominion over them.

The opinions of the attorney and solicitor general, Pratt and Yorke, have been adduced to prove, that, in the opinion of those great law officers, the Indian grant could convey a title to the soil without a patent emanating from the crown. The opinion of those persons would certainly be of great authority on such a question, and we were not a little surprised, when it was read, at the doctrine it seemed to advance. An opinion so contrary to the whole practice of the crown, and to the uniform opinions given on all other occasions by its great law officers, ought to be very explicit, and accompanied by the circumstances under which it was given and to which it was applied, before we can be assured that it is properly understood. In a pamphlet, written for the purpose of asserting the Indian title, styled "Plain Facts," the same opinion is quoted, and is said to relate to purchases made in the East Indies. It is, of course, entirely inapplicable to purchases made in America. Chalmers, in whose collection this opinion is found, does not say to whom it applies; but there is reason to believe that the author of "Plain Facts" is in this respect correct. The opinion commences thus: "In respect to such places as have been or shall be acquired, by treaty or grant, from any of the Indian princes or governments, your majesty's letters patent are not necessary." The words "princes or governments" are usually applied to the East Indians, but not to those of North America. We speak of their sachems, their warriors, their chief men, their nations or tribes, not of their "princes or governments." The question, on which the opinion was given, too, and to which it relates, was, whether the king's subjects carry with them the common law wherever

8 Wh. 599.

they may form settlements. The opinion is given with a view to this point, and its object must be kept in mind while construing its expressions.

Much reliance is also placed on the fact that many tracts are now held in the United States under the Indian title, the validity of which is not questioned.

Before the importance attached to this fact is conceded, the circumstances, under which such grants were obtained, and such titles are supported, ought to be considered. These lands lie chiefly in the eastern states. It is known that the Plymouth Company made many extensive grants, which, from their ignorance of the country, interfered with each other. It is also known that Mason, to whom New Hampshire, and Gorges, to whom Maine, was granted, found great difficulty in managing such unwieldy property. The country was settled by emigrants, some from Europe, but chiefly from Massachusetts, who took possession of lands they found unoccupied, and secured themselves in that possession by the best means in their power. The disturbances in England, and the civil war and revolution which followed those disturbances, prevented any interference on the part of the mother country, and the proprietors were unable to maintain their title. In the mean time Massachusetts claimed the country and governed it. As her claim was adversary to that of the proprietors, she encouraged the settlement of persons made under her authority, and encouraged, likewise, their securing themselves in possession, by purchasing the acquiescence and forbearance of the Indians.

After the restoration of Charles II., Gorges and Mason, when they attempted to establish their title, found themselves opposed by men who held under Massachusetts, and under the Indians. The title of the proprietors was resisted; and though, in some cases, compromises were made, and in some the opinion of a court was given ultimately in their favor, the juries found uniformly against them. They became wearied with the struggle, and sold their property. The titles held under the Indians were sanctioned by length of possession; but there is no case,

8 Wh. 600.

so far as we are informed, of a judicial decision in their favor.

Much reliance has also been placed on a recital contained in the charter of Rhode Island, and on a letter addressed to the governors of the neighboring colonies, by the king's command, in which some expressions are inserted indicating the royal approbation of titles acquired from the Indians.

The charter to Rhode Island recites "that the said John Clark, and others, had transplanted themselves into the midst of the Indian nations, and were seized and possessed, by purchase and consent of the said natives, to their full content, of such lands," &c. And the letter recites that "Thomas Chiffinch, and others, having, in the right of Major Asperton, a just propriety in the Narraghanset country, in New England, by grants from the native princes of that country, and being desirous to improve it into an English colony," &c., "are yet daily disturbed."

The impression this language might make, if viewed apart from the circumstances under which it was employed, will be effaced when considered in connexion with those circumstances.

In the year 1635 the Plymouth Company surrendered their charter to the crown. About the same time the religious dissensions of Massachusetts expelled from that colony several societies of individuals, one of which settled in Rhode Island on lands purchased from the Indians. They were not within the chartered limits of Massachusetts, and the English government was too much occupied at home to bestow its attention on this subject. There existed no authority to arrest their settlement of the country. If they obtained the Indian title, there were none to assert the title of the crown. Under these circumstances the settlement became considerable. Individuals acquired separate property in lands which they cultivated and improved; a government was established among themselves; and no power existed in America which could rightfully interfere with it.

On the restoration of Charles II., this small society hastened to acknowledge his authority, and to solicit his confirmation of

8 Wh. 602.

their title to the soil, and to jurisdiction over the country. Their solicitations were successful, and a charter was granted to them containing the recital which has been mentioned.

It is obvious that this transaction can amount to no acknowledgment that the Indian grant could convey a title paramount to that of the crown, or could, in itself, constitute a complete title. On the contrary, the charter of the crown was considered as indispensable to its completion.

It has never been contended that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right. The object of the crown was to settle the sea-coast of America; and when a portion of it was settled, without violating the rights of others, by persons professing their loyalty, and soliciting the royal sanction of an act the consequences of which were ascertained to be beneficial, it would have been as unwise as ungracious to expel them from their habitations because they had obtained the Indian title otherwise than through the agency of government. The very grant of a charter is an assertion of the title of the crown, and its words convey the same idea. The country granted is said to be "our island, called Rhode Island;" and the charter contains an actual grant of the soil, as well as of the powers of government.

The letter was written a few months before the charter was issued, apparently at the request of the agents of the intended colony, for the sole purpose of preventing the trespasses of neighbors who were disposed to claim some authority over them. The king, being willing himself to ratify and confirm their title, was, of course, inclined to quiet them in their possession.

This charter and this letter certainly sanction a previous unauthorized purchase from Indians, under the circumstances attending that particular purchase, but are far from supporting the general proposition that a title acquired from the Indians would be valid against a title acquired from the crown, or without the confirmation of the crown.

8 Wh. 603.

The acts of the several colonial assemblies prohibiting purchases from the Indians have also been relied on, as proving, that, independent of such prohibitions, Indian deeds would be valid. But we think this fact, at most, equivocal. While the existence of such purchases would justify their prohibition, even by colonies which considered Indian deeds as previously invalid, the fact that such acts have been generally passed is strong evidence of the general opinion that such purchases are opposed by the soundest principles of wisdom and national policy.

After bestowing on this subject a degree of attention which was more required by the magnitude of the interest in litigation, and the able and elaborate arguments of the bar, than by its intrinsic difficulty, the court is decidedly of opinion that the plaintiffs do not exhibit a title which can be sustained in the courts of the United States; and that there is no error in the judgment which was rendered against them in the district court of Illinois.

Judgment affirmed, with costs.

8 Wh. 604.

GIBBONS v. OGDEN.

FEBRUARY TERM, 1824.

[9 Wheaton's Reports, 1-240.]

The state of New York granted, for a term of years, an exclusive right to Robert R. Livingston and Robert Fulton to navigate the waters of that state with boats moved by steam; and from them Ogden derived a right to use such boats in the waters between Elizabethtown, New Jersey, and the city of New York. Gibbons having established two steamboats on these waters, Ogden obtained an injunction* against him; and upon hearing of the case in the court of chancery in New York, the defence of Gibbons, which was that his boats were regularly licensed as coasters under the laws of congress, was overruled, and the injunction made perpetual. Gibbons took it to the court of errors, which affirmed the decree in chancery; and as that was the highest state tribunal, he now brought it, on writ of error, to the supreme court,—the opinion of which was given by Chief Justice Marshall, as follows:—

The appellant contends that this decree is erroneous, because the laws, which purport to give the exclusive privilege it sustains, are repugnant to the constitution and laws of the United States.

They are said to be repugnant—

1st. To that clause in the constitution which authorizes congress to regulate commerce.

2d. To that which authorizes congress to promote the progress of science and useful arts.

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* This is a writ which issues from a court of chancery, and forbids the doing of some act; as, in this case, the use of the steamboats by Gibbons.

The state of New York maintains the constitutionality of these laws; and their legislature, their council of revision, and their judges, have repeatedly concurred in this opinion. It is supported by great names—by names which have all the titles to consideration that virtue, intelligence, and office can bestow. No tribunal can approach the decision of this question without feeling a just and real respect for that opinion which is sustained by such authority; but it is the province of this court, while it respects, not to bow to it implicitly; and the judges must exercise, in the examination of the subject, that understanding which Providence has bestowed upon them, with that independence which the people of the United States expect from this department of the government.

As preliminary to the very able discussions of the constitution which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these states anterior to its formation. It has been said, that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But when these allied sovereigns converted their league into a government, when they converted their congress of ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature, empowered to enact laws on the most interesting subjects, the whole character in which the states appear underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.

This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants expressly the means for carrying all others into execution, congress is authorized "to make all laws which shall be necessary and proper" for the purpose. But this limitation on the means which may

9 Wh. 187.

be used is not extended to the powers which are conferred; nor is there one sentence in the constitution, which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. What do gentlemen mean by a strict construction? If they contend only against that enlarged construction which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction which would cripple the government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the constitution is to be expounded. As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. The grant does not convey power which might be beneficial to the grantor, if retained by himself, or which can inure solely to the benefit of the grantee; but is an investment of power for the general advantage, in the hands of agents selected for that purpose; which power can never be exercised by the peo-

9 Wh. 188.

ple themselves, but must be placed in the hands of agents, or lie dormant. We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connexion with the purposes for which they were conferred.

The words are, "Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals in the actual employment of buying and selling, or of barter.

If commerce does not include navigation, the government of the union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce" to comprehend navigation. It was so understood, and must have been so understood, when the constitution was

framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense, because all have understood it in that sense; and the attempt to restrict it comes too late.

If the opinion, that "commerce," as the word is used in the constitution, comprehends navigation also, requires any additional confirmation, that additional confirmation is, we think, furnished by the words of the instrument itself.

It is a rule of construction, acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power that which was not granted,—that which the words of the grant could not comprehend. If, then, there are in the constitution plain exceptions from the power over navigation, plain inhibitions to the exercise of that power in a particular way, it is a proof that those who made these exceptions, and prescribed these inhibitions, understood the power to which they applied as being granted.

The ninth section of the first article declares that "no preference shall be given, by any regulation of commerce or revenue, to the ports of one state over those of another." This clause cannot be understood as applicable to those laws only which are passed for the purposes of revenue, because it is expressly applied to commercial regulations; and the most obvious preference which can be given to one port over another, in regulating commerce, relates to navigation. But the subsequent part of the sentence is still more explicit. It is, "nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another." These words have a direct reference to navigation.

The universally acknowledged power of the government to impose embargoes must also be considered as showing that all America is united in that construction which comprehends navigation in the word "commerce." Gentlemen have said, in argu-

9 Wh. 191.

ment, that this is a branch of the war-making power, and that an embargo is an instrument of war, not a regulation of trade.

That it may be, and often is, used as an instrument of war cannot be denied. An embargo may be imposed for the purpose of facilitating the equipment or manning of a fleet, or for the purpose of concealing the progress of an expedition preparing to sail from a particular port. In these, and in similar cases, it is a military instrument, and partakes of the nature of war. But all embargoes are not of this description. They are sometimes resorted to without a view to war, and with a single view to commerce. In such case an embargo is no more a war measure than a merchantman is a ship of war because both are vessels which navigate the ocean with sails and seamen.

When congress imposed that embargo which, for a time, engaged the attention of every man in the United States, the avowed object of the law was the protection of commerce, and the avoiding of war. By its friends and its enemies it was treated as a commercial, not as a war measure. The persevering earnestness and zeal with which it was opposed, in a part of our country which supposed its interests to be vitally affected by the act, cannot be forgotten. A want of acuteness in discovering objections to a measure to which they felt the most deep-rooted hostility will not be imputed to those who were arrayed in opposition to this. Yet they never suspected that navigation was no branch of trade, and was, therefore, not comprehended in the power to regulate commerce. They did, indeed, contest the constitutionality of the act, but on a principle which admits the construction for which the appellant contends. They denied that the particular law in question was made in pursuance of the constitution, not because the power could not act directly on vessels, but because a perpetual embargo was the annihilation, and not the regulation, of commerce. In terms, they admitted the applicability of the words used in the constitution to vessels; and that, in a case which produced a degree and extent of excitement calculated to draw forth every principle on which legitimate resistance could be sustained.

9 Wh. 192.

No example could more strongly illustrate the universal understanding of the American people on this subject.

The word used in the constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce."

To what commerce does this power extend? The constitution informs us, to commerce "with foreign nations, and among the several states, and with the Indian tribes."

It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend. It has been truly said that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term.

If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain, intelligible cause which alters it.

The subject to which the power is next applied is to commerce "among the several states." The word "among" means intermingle with. A thing which is among others is intermingled with them. Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior.

It is not intended to say that these words comprehend that commerce which is completely internal; which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary.

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a state,

9 Wh. 194.

because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a state. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself.

But in regulating commerce with foreign nations, the power of congress does not stop at the jurisdictional lines of the several states. It would be a very useless power, if it could not pass those lines. The commerce of the United States with foreign nations is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction pass through the interior of almost every state in the union, and furnish the means of exercising this right. If congress has the power to regulate it, that power must be exercised wherever the subject exists. If it exists within the states, if a foreign voyage may commence or terminate at a port within a state, then the power of congress may be exercised within a state.

This principle is, if possible, still more clear, when applied to commerce "among the several states." They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other states lie between them. What is commerce "among" them? and how is it to be conducted? Can a trading expedition between two adjoining states commence and terminate outside

9 Wh. 195.

of each? And if the trading intercourse be between two states remote from each other, must it not commence in one, terminate in the other, and, probably, pass through a third? Commerce among the states must, of necessity, be commerce with the states. In the regulation of trade with the Indian tribes, the action of the law, especially when the constitution was made, was chiefly within a state. The power of congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several states. The sense of the nation on this subject is unequivocally manifested by the provisions made in the laws for transporting goods, by land, between Baltimore and Providence, between New York and Philadelphia, and between Philadelphia and Baltimore.

We are now arrived at the inquiry, What is this power?

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

The power of congress, then, comprehends navigation within the limits of every state in the union; so far as that naviga-

tion may be, in any manner, connected with "commerce with foreign nations, or among the several states, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies.

But it has been urged with great earnestness, that, although the power of congress to regulate commerce with foreign nations, and among the several states, be coextensive with the subject itself, and have no other limits than are prescribed in the constitution, yet the states may severally exercise the same power within their respective jurisdictions. In support of this argument it is said that they possessed it, as an inseparable attribute of sovereignty, before the formation of the constitution, and still retain it, except so far as they have surrendered it by that instrument; that this principle results from the nature of the government, and is secured by the tenth amendment, that an affirmative grant of power is not exclusive, unless in its own nature it be such that the continued exercise of it by the former possessor is inconsistent with the grant, and that this is not of that description.

The appellant, conceding these postulates, except the last, contends that full power to regulate a particular subject implies the whole power, and leaves no residuum; that a grant of the whole is incompatible with the existence of a right in another to any part of it.

Both parties have appealed to the constitution, to legislative acts, and judicial decisions; and have drawn arguments from all these sources to support and illustrate the propositions they respectively maintain.

The grant of the power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the states; and hence has been drawn an argument which has been applied to the question under consideration. But the two grants are not, it is conceived, similar in their terms or their nature. Although many of the powers for-

9 Wh. 198.

merly exercised by the states are transferred to the government of the union, yet the state governments remain, and constitute, a most important part of our system. The power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time. We are accustomed to see it placed, for different purposes, in different hands. Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and a power in one to take what is necessary for certain purposes is not, in its nature, incompatible with a power in another to take what is necessary for other purposes. Congress is authorized to lay and collect taxes, &c., to pay the debts, and provide for the common defence and general welfare, of the United States. This does not interfere with the power of the states to tax for the support of their own governments; nor is the exercise of that power by the states an exercise of any portion of the power that is granted to the United States. In imposing taxes for state purposes they are not doing what congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the states. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But when a state proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power that is granted to congress, and is doing the very thing which congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce.

In discussing the question, whether this power is still in the states, in the case under consideration, we may dismiss from it the inquiry, whether it is surrendered by the mere grant to congress, or is retained until congress shall exercise the power. We may dismiss that inquiry, because it has been exercised, and the regulations which congress deemed it proper to make are now in full operation. The sole question is, Can a state

9 Wh. 199.

regulate commerce with foreign nations and among the states, while congress is regulating it?

The counsel for the respondent answer this question in the affirmative, and rely very much on the restrictions in the tenth section, as supporting their opinion. They say, very truly, that limitations of a power furnish a strong argument in favor of the existence of that power; and that the section, which prohibits the states from laying duties on imports or exports, proves that this power might have been exercised, had it not been expressly forbidden; and, consequently, that any other commercial regulation, not expressly forbidden, to which the original power of the state was competent, may still be made.

That this restriction shows the opinion of the convention, that a state might impose duties on exports and imports, if not expressly forbidden, will be conceded; but that it follows, as a consequence, from this concession, that a state may regulate commerce with foreign nations and among the states, cannot be admitted.

We must first determine whether the act of laying "duties or imposts on imports or exports" is considered in the constitution as a branch of the taxing power, or of the power to regulate commerce. We think it very clear that it is considered as a branch of the taxing power. It is so treated in the first clause of the eighth section: "Congress shall have power to lay and collect taxes, duties, imposts, and excises;" and before commerce is mentioned, the rule by which the exercise of this power must be governed is declared. It is, that all duties, imposts, and excises shall be uniform. In a separate clause of the enumeration the power to regulate commerce is given, as being entirely distinct from the right to levy taxes and imposts, and as being a new power not before conferred. The constitution, then, considers these powers as substantive, and distinct from each other; and so places them in the enumeration it contains. The power of imposing duties on imports is classed with the power to levy taxes, and that seems to be its natural place. But the power to levy taxes could never be considered as abridg-

ing the right of the states on that subject; and they might, consequently, have exercised it by levying duties on imports or exports, had the constitution contained no prohibition on this subject. This prohibition, then, is an exception from the acknowledged power of the states to levy taxes, not from the questionable power to regulate commerce.

"A duty of tonnage" is as much a tax as a duty on imports or exports; and the reason which induced the prohibition of those taxes extends to this also. This tax may be imposed by a state, with the consent of congress; and it may be admitted that congress cannot give a right to a state, in virtue of its own powers. But a duty of tonnage being part of the power of imposing taxes, its prohibition may certainly be made to depend on congress, without affording any implication respecting a power to regulate commerce. It is true that duties may often be, and in fact often are, imposed on tonnage, with a view to the regulation of commerce; but they may be also imposed with a view to revenue; and it was, therefore, a prudent precaution to prohibit the states from exercising this power. The idea, that the same measure might, according to circumstances, be arranged with different classes of power, was no novelty to the framers of our constitution. Those illustrious statesmen and patriots had been, many of them, deeply engaged in the discussions which preceded the war of our revolution, and all of them were well read in those discussions. The right to regulate commerce, even by the imposition of duties, was not controverted; but the right to impose a duty for the purpose of revenue produced a war as important, perhaps, in its consequences to the human race, as any the world has ever witnessed.

These restrictions, then, are on the taxing power, not on that to regulate commerce; and presuppose the existence of that which they restrain, not of that which they do not purport to restrain.

But the inspection laws are said to be regulations of commerce, and are certainly recognized in the constitution as being passed in the exercise of a power remaining with the states.

9 Wh. 202.

That inspection laws may have a remote and considerable influence on commerce will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived cannot be admitted. The object of inspection laws is to improve the quality of articles produced by the labor of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose. They form a portion of that immense mass of legislation, which embraces everything within the territory of a state, not surrendered to the general government; all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, &c., are component parts of this mass.

No direct general power over these objects is granted to congress; and consequently they remain subject to state legislation. If the legislative power of the union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given. It is obvious that the government of the union, in the exercise of its express powers, that, for example, of regulating commerce with foreign nations and among the states, may use means that may also be employed by a state in the exercise of its acknowledged powers; that, for example, of regulating commerce within the state. If congress license vessels to sail from one port to another in the same state, the act is supposed to be necessarily incidental to the power expressly granted to congress, and implies no claim of a direct power to regulate the purely internal commerce of a state, or to act directly on its system of police. So, if a state, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which congress may adopt, it does not derive its authority from the particular power which

9 Wh. 203.

has been granted, but from some other which remains with the state, and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.

In our complex system, presenting the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers and of numerous state governments, which retain and exercise all powers not delegated to the union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers would often be of the same description, and might sometimes interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other.

The acts of congress, passed in 1796 and 1799,* empowering and directing the officers of the general government to conform to and assist in the execution of the quarantine and health laws of a state, proceed, it is said, upon the idea that these laws are constitutional. It is undoubtedly true that they do proceed upon that idea; and the constitutionality of such laws has never, so far as we are informed, been denied. But they do not imply an acknowledgment that a state may rightfully regulate commerce with foreign nations, or among the states; for they do not imply that such laws are an exercise of that power, or enacted with a view to it. On the contrary, they are treated as quarantine and health laws, are so denominated in the acts of congress, and are considered as flowing from the acknowledged power of a state to provide for the health of its citizens. But

* 2 U. S. Laws, p. 545; U. S. Laws, p. 126.

as it was apparent that some of the provisions made for this purpose, and in virtue of this power, might interfere with, and be affected by, the laws of the United States made for the regulation of commerce, congress, in that spirit of harmony and conciliation which ought always to characterize the conduct of governments standing in the relation which that of the union and those of the states bear to each other, has directed its officers to aid in the execution of these laws; and has, in some measure, adapted its own legislation to this object, by making provisions in aid of those of the states. But in making these provisions, the opinion is unequivocally manifested that congress may control the state laws, so far as it may be necessary to control them for the regulation of commerce.

The act, passed in 1803,* prohibiting the importation of slaves into any state which shall itself prohibit their importation, implies, it is said, an admission that the states possessed the power to exclude or admit them; from which it is inferred that they possess the same power with respect to other articles.

If this inference were correct, if this power was exercised not under any particular clause in the constitution, but in virtue of a general right over the subject of commerce, to exist as long as the constitution itself, it might now be exercised. Any state might now import African slaves into its own territory. But it is obvious that the power of the states over this subject, previous to the year 1808, constitutes an exception to the power of congress to regulate commerce, and the exception is expressed in such words as to manifest clearly the intention to continue the pre-existing right of the states to admit or exclude, for a limited period. The words are, "The migration or importation of such persons as any of the states, now existing, shall think proper to admit, shall not be prohibited by the congress prior to the year 1808." The whole object of the exception is to preserve the power to those states which might be disposed to exercise it; and its language seems to the court to convey this

* U. S. Laws, p. 529.

9 Wh. 206.

idea unequivocally. The possession of this particular power, then, during the time limited in the constitution, cannot be admitted to prove the possession of any other similar power.

It has been said that the act of August 7th, 1789, acknowledges a concurrent power in the states to regulate the conduct of pilots, and hence is inferred an admission of their concurrent right with congress to regulate commerce with foreign nations, and amongst the states. But this inference is not, we think, justified by the fact.

Although congress cannot enable a state to legislate, congress may adopt the provisions of a state on any subject. When the government of the union was brought into existence, it found a system for the regulation of its pilots in full force in every state. The act which has been mentioned adopts this system, and gives it the same validity as if its provisions had been specially made by congress. But the act, it may be said, is prospective also, and the adoption of laws to be made in future presupposes the right in the maker to legislate on the subject.

The act unquestionably manifests an intention to leave this subject entirely to the states, until congress should think proper to interpose; but the very enactment of such a law indicates an opinion that it was necessary; that the existing system would not be applicable to the new state of things, unless expressly applied to it by congress. But this section is confined to pilots within the "bays, inlets, rivers, harbors, and ports of the United States," which are, of course, in whole or in part, also within the limits of some particular state. The acknowledged power of a state to regulate its police, its domestic trade, and to govern its own citizens, may enable it to legislate on this subject, to a considerable extent; and the adoption of its system by congress, and the application of it to the whole subject of commerce, does not seem to the court to imply a right in the states so to apply it of their own authority. But the adoption of the state system being temporary, being only "until further legislative provision shall be made by congress," shows, conclusively, an

9 Wh. 207.

opinion that congress could control the whole subject, and might adopt the system of the states, or provide one of its own.

A state, it is said, or even a private citizen, may construct light-houses. But gentlemen must be aware, that, if this proves a power in a state to regulate commerce, it proves that the same power is in the citizen. States, or individuals, who own lands, may, if not forbidden by law, erect on those lands what buildings they please; but this power is entirely distinct from that of regulating commerce, and may, we presume, be restrained, if exercised so as to produce a public mischief.

These acts were cited at the bar for the purpose of showing an opinion in congress, that the states possess, concurrently with the legislature of the union, the power to regulate commerce with foreign nations and among the states. Upon reviewing them, we think they do not establish the proposition they were intended to prove. They show the opinion that the states retain powers enabling them to pass the laws to which allusion has been made, not that those laws proceed from the particular power which has been delegated to congress.

It has been contended by the counsel for the appellant, that, as the word "to regulate" implies in its nature full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched as that on which it has operated.

There is great force in this argument, and the court is not satisfied that it has been refuted.

Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the states may sometimes enact laws the validity of which depends on their interfering with, and being contrary to, an act of congress passed in pursuance of the constitution, the court will

9 Wh, 209.

enter upon the inquiry, whether the laws of New York, as expounded by the highest tribunal of that state, have, in their application to this case, come into collision with an act of congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power "to regulate commerce with foreign nations and among the several states," or, in virtue of a power to regulate their domestic trade and police. In one case and the other the acts of New York must yield to the law of congress; and the decision, sustaining the privilege they confer against a right given by a law of the union, must be erroneous.

This opinion has been frequently expressed in this court, and is founded as well on the nature of the government as on the words of the constitution. In argument, however, it has been contended, that, if a law passed by a state, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by congress in pursuance of the constitution, they affect the subject, and each other, like equal opposing powers.

But the framers of our constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act inconsistent with the constitution is produced by the declaration that the constitution is the supreme law. The appropriate application of that part of the clause, which confers the same supremacy on laws and treaties, is to such acts of the state legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged state powers, interfere with, or are contrary to, the laws of congress made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case the act of congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it.

In pursuing this inquiry at the bar, it has been said that the constitution does not confer the right of intercourse between

9 Wh. 210.

state and state. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. This is true. The constitution found it an existing right, and gave to congress the power to regulate it. In the exercise of this power congress has passed "An act for enrolling or licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same." The counsel for the respondent contend that this act does not give the right to sail from port to port, but confines itself to regulating a pre-existing right, so far only as to confer certain privileges on enrolled and licensed vessels in its exercise.

It will at once occur, that, when a legislature attaches certain privileges and exemptions to the exercise of a right over which its control is absolute, the law must imply a power to exercise the right. The privileges are gone, if the right itself be annihilated. It would be contrary to all reason, and to the course of human affairs, to say that a state is unable to strip a vessel of the particular privileges attendant on the exercise of a right, and yet may annul the right itself; that the state of New York cannot prevent an enrolled and licensed vessel, proceeding from Elizabethtown, in New Jersey, to New York, from enjoying, in her course, and on her entrance into port, all the privileges conferred by the act of congress; but can shut her up in her own port, and prohibit altogether her entering the waters and ports of another state. To the court it seems very clear that the whole act on the subject of the coasting trade, according to those principles which govern the construction of statutes, implies, unequivocally, an authority to licensed vessels to carry on the coasting trade.

But we will proceed briefly to notice those sections which bear more directly on the subject.

The first section declares that vessels enrolled by virtue of a previous law, and certain other vessels, enrolled as described in that act, and having a license in force, as is by the act required, "and no others, shall be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade."

9 Wh. 212.

This section seems to the court to contain a positive enactment that the vessels it describes shall be entitled to the privileges of ships or vessels employed in the coasting trade. These privileges cannot be separated from the trade, and cannot be enjoyed, unless the trade may be prosecuted. The grant of the privilege is an idle, empty form, conveying nothing, unless it convey the right to which the privilege is attached, and in the exercise of which its whole value consists. To construe these words otherwise than as entitling the ships or vessels described to carry on the coasting trade would be, we think, to disregard the apparent intent of the act.

The fourth section directs the proper officer to grant to a vessel qualified to receive it "a license for carrying on the coasting trade," and prescribes its form. After reciting the compliance of the applicant with the previous requisites of the law, the operative words of the instrument are, "license is hereby granted for the said steamboat, Bellona, to be employed in carrying on the coasting trade for one year from the date hereof, and no longer."

These are not the words of the officer; they are the words of the legislature; and convey as explicitly the authority the act intended to give, and operate as effectually, as if they had been inserted in any other part of the act than in the license itself.

The word "license" means permission, or authority; and a license to do any particular thing is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right, which the grantor can transfer, to do what is within the terms of the license.

Would the validity or effect of such an instrument be questioned by the respondent, if executed by persons claiming regularly under the laws of New York?

The license must be understood to be, what it purports to be, a legislative authority to the steamboat Bellona "to be em-

9 Wh. 212.

ployed in carrying on the coasting trade for one year from this date."

It has been denied that these words authorize a voyage from New Jersey to New York. It is true that no ports are specified; but it is equally true that the words used are perfectly intelligible, and do confer such authority as unquestionably as if the ports had been mentioned. The coasting trade is a term well understood. The law has defined it; and all know its meaning perfectly. The act describes, with great minuteness, the various operations of a vessel engaged in it; and it cannot, we think, be doubted that a voyage from New Jersey to New York is one of those operations.

Notwithstanding the decided language of the license, it has also been maintained that it gives no right to trade; and that its sole purpose is to confer the American character.

The answer given to this argument, that the American character is conferred by the enrolment, and not by the license, is, we think, founded too clearly in the words of the law to require the support of any additional observations. The enrolment of vessels designed for the coasting trade corresponds precisely with the registration of vessels designed for the foreign trade, and requires every circumstance which can constitute the American character. The license can be granted only to vessels already enrolled, if they be of the burden of twenty tons and upwards; and requires no circumstance essential to the American character.

The object of the license, then, cannot be to ascertain the character of the vessel, but to do what it professes to do,—that is, to give permission to a vessel, already proved by her enrolment to be American, to carry on the coasting trade.

But if the license be a permit to carry on the coasting trade, the respondent denies that these boats were engaged in that trade, or that the decree under consideration has restrained them from prosecuting it. The boats of the appellant were, we are told, employed in the transportation of passengers; and this is no part of that commerce which congress may regulate.

9 Wh. 214.

If, as our whole course of legislation on this subject shows, the power of congress has been universally understood in America to comprehend navigation, it is a very persuasive, if not a conclusive, argument to prove that the construction is correct; and if it be correct, no clear distinction is perceived between the power to regulate vessels employed in transporting men for hire and property for hire. The subject is transferred to congress; and no exception to the grant can be admitted which is not proved by the words or the nature of the thing. A coasting vessel employed in the transportation of passengers is as much a portion of the American marine as one employed in the transportation of a cargo; and no reason is perceived why such vessel should be withdrawn from the regulating power of that government which has been thought best fitted for the purpose generally. The provisions of the law respecting native seamen, and respecting ownership, are as applicable to vessels carrying men as to vessels carrying manufactures; and no reason is perceived why the power over the subject should not be placed in the same hands. The argument urged at the bar rests on the foundation that the power of congress does not extend to navigation as a branch of commerce, and can only be applied to that subject incidentally and occasionally. But if that foundation be removed, we must show some plain, intelligible distinction, supported by the constitution or by reason, for discriminating between the power of congress over vessels employed in navigating the same seas. We can perceive no such distinction.

If we refer to the constitution, the inference to be drawn from it is rather against the distinction. The section, which restrains congress from prohibiting the migration or importation of such persons as any of the states may think proper to admit, until the year 1808, has always been considered as an exception from the power to regulate commerce, and certainly seems to class migration with importation. Migration applies as appropriately to voluntary, as importation does to involuntary arrivals; and so far as an exception from a power proves its existence, this section proves that the power to regulate commerce applies

9 Wh. 216.

equally to the regulation of vessels employed in transporting men who pass from place to place voluntarily, and to those who pass involuntarily.

If the power reside in congress, as a portion of the general grant to regulate commerce, then acts applying that power to vessels generally must be construed as comprehending all vessels. If none appear to be excluded by the language of the act, none can be excluded by construction. Vessels have always been employed, to a greater or less extent, in the transportation of passengers, and have never been supposed to be, on that account, withdrawn from the control or protection of congress. Packets which ply along the coast, as well as those which make voyages between Europe and America, consider the transportation of passengers as an important part of their business. Yet it has never been suspected that the general laws of navigation did not apply to them.

The duty act, sections twenty-three and forty-six, contains provisions respecting passengers, and shows that vessels which transport them have the same rights, and must perform the same duties, with other vessels. They are governed by the general laws of navigation.

In the progress of things this seems to have grown into a particular employment, and to have attracted the particular attention of government. Congress was no longer satisfied with comprehending vessels engaged specially in this business within those provisions which were intended for vessels generally; and on the 2d of March, 1819, passed "An act regulating passenger ships and vessels." This wise and humane law provides for the safety and comfort of passengers, and for the communication of everything concerning them, which may interest the government, to the department of state; but makes no provision concerning the entry of the vessel, or her conduct in the waters of the United States. This, we think, shows conclusively the sense of congress, (if, indeed, any evidence to that point could be required,) that the pre-existing regulations comprehended passenger ships among others; and in prescribing the same duties the

9 Wh. 217.

legislature must have considered them as possessing the same rights.

If, then, it were even true that the Bellona and the Stoudinger were employed exclusively in the conveyance of passengers between New York and New Jersey, it would not follow that this occupation did not constitute a part of the coasting trade of the United States, and was not protected by the license annexed to the answer. But we cannot perceive how the occupation of these vessels can be drawn into question in the case before the court. The laws of New York, which grant the exclusive privilege set up by the respondent, take no notice of the employment of vessels, and relate only to the principle by which they are propelled. Those laws do not inquire whether vessels are engaged in transporting men or merchandise, but whether they are moved by steam or wind. If by the former, the waters of New York are closed against them, though their cargoes be dutiable goods, which the laws of the United States permit them to enter and deliver in New York. If by the latter, those waters are free to them, though they should carry passengers only. In conformity with the law is the bill of the plaintiff in the state court. The bill does not complain that the Bellona and the Stoudinger carry passengers, but that they are moved by steam. This is the injury of which he complains, and is the sole injury against the continuance of which he asks relief. The bill does not even allege, specially, that those vessels were employed in the transportation of passengers, but says, generally, that they were employed "in the transportation of passengers or otherwise." The answer avers only that they were employed in the coasting trade, and insists on the right to carry on any trade authorized by the license. No testimony is taken, and the writ of injunction and decree restrain these licensed vessels not from carrying passengers, but from being moved through the waters of New York by steam for any purpose whatever.

The questions, then, whether the conveyance of passengers be a part of the coasting trade, and whether a vessel can be protected in that occupation by a coasting license, are not, and

9 Wh. 218.

cannot be, raised in this case. The real and sole question seems to be whether a steam machine, in actual use, deprives a vessel of privileges conferred by a license.

In considering this question, the first idea which presents itself is that the laws of congress for the regulation of commerce do not look to the principle by which vessels are moved. That subject is left entirely to individual discretion; and in that vast and complex system of legislative enactment concerning it, which embraces everything that the legislature thought it necessary to notice, there is not, we believe, one word respecting the peculiar principle by which vessels are propelled through the water, except what may be found in a single act granting a particular privilege to steamboats. With this exception, every act, either prescribing duties, or granting privileges, applies to every vessel, whether navigated by the instrumentality of wind or fire, of sails or machinery. The whole weight of proof, then, is thrown upon him who would introduce a distinction to which the words of the law give no countenance.

If a real difference could be admitted to exist between vessels carrying passengers and others, it has already been observed that there is no fact in this case which can bring up that question. And if the occupation of steamboats be a matter of such general notoriety that the court may be presumed to know it, although not specially informed by the record, then we deny that the transportation of passengers is their exclusive occupation. It is a matter of general history that in our western waters their principal employment is the transportation of merchandise; and all know that in the waters of the Atlantic they are frequently so employed.

But all inquiry into this subject seems to the court to be put completely at rest by the act already mentioned, entitled "An act for the enrolment and licensing of steamboats."

This act authorizes a steamboat employed, or intended to be employed, only in a river or bay of the United States, owned wholly or in part by an alien, resident within the United States, to be enrolled and licensed as if the same belonged to a citizen of the United States.

9 Wh. 220.

This act demonstrates the opinion of congress that steamboats may be enrolled and licensed, in common with vessels using sails. They are, of course, entitled to the same privileges, and can no more be restrained from navigating waters and entering ports which are free to such vessels than if they were wafted on their voyage by the winds, instead of being propelled by the agency of fire. The one element may be as legitimately used as the other, for every commercial purpose authorized by the laws of the union; and the act of a state, inhibiting the use of either to any vessel having a license under the act of congress. comes, we think, in direct collision with that act.

As this decides the cause, it is unnecessary to enter on an examination of that part of the constitution which empowers congress to promote the progress of science and the useful arts.

The court is aware, that, in stating the train of reasoning by which we have been conducted to this result, much time has been consumed in the attempt to demonstrate propositions which may have been thought axioms. It is felt that the tediousness inseparable from the endeavor to prove that which is already clear is imputable to a considerable part of this opinion. But it was unavoidable. The conclusion to which we have come depends on a chain of principles which it was necessary to preserve unbroken; and although some of them were thought nearly self-evident, the magnitude of the question, the weight of character belonging to those from whose judgment we dissent, and the argument at the bar, demanded that we should assume nothing.

Powerful and ingenious minds, taking, as postulates, that the powers expressly granted to the government of the union are to be contracted, by construction, into the narrowest possible compass, and that the original powers of the states are retained, if any possible construction will retain them, may, by a course of well digested, but refined and metaphysical reasoning, founded on these premises, explain away the constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use. They may so entangle and perplex

9 Wh. 221.

the understanding as to obscure principles which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived. In such a case it is peculiarly necessary to recur to safe and fundamental principles, to sustain those principles, and, when sustained, to make them the tests of the arguments to be examined.

9 Wh. 222.

OSBORN AND OTHERS v. THE BANK OF THE UNITED STATES.

FEBRUARY TERM, 1824.

[9 Wheaton's Reports, 738-903.]

The legislature of Ohio, in 1819, passed an act for collecting a tax from banks, &c., doing banking business in that state without being allowed to do so by the laws thereof. Under this act the Bank of the United States was to pay an annual tax of fifty thousand dollars, if it continued to do business in Ohio after a specified time; and this tax the state auditor was authorized to issue his warrant for, empowering the bearer to enter the banking-house by force and seize any property he might find.

To prevent any proceeding, the bank, on the 14th of September, filed their bill in the United States circuit court for an injunction against Osborn, the state auditor, which was granted, and notice given him. After notice was given, but before the injunction issued, the banking-house was entered, under a warrant from Osborn, and ninety-eight thousand dollars taken in specie and bills, which was delivered to the treasurer of the state. The bank then amended their bill, stating these facts; and upon a hearing the circuit court ordered the money to be restored to the bank, with interest on the specie. Osborn appealed to the supreme court,—the opinion of which was given by the chief justice as follows:—

At the close of the argument a point was suggested of such vital importance as to induce the court to request that it might be particularly spoken to. That point is, the right of the bank to sue in the courts of the United States. It has been argued, and ought to be disposed of, before we proceed to the act-

9 Wh. 816.

ual exercise of jurisdiction, by deciding on the rights of the parties.

The appellants contest the jurisdiction of the court on two grounds:—

1st. That the act of congress has not given it.

2d. That, under the constitution, congress cannot give it.

1. The first part of the objection depends entirely on the language of the act. The words are, that the bank shall be "made able and capable in law," "to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all state courts having competent jurisdiction, and in any circuit court of the United States."

These words seem to the court to admit of but one interpretation. They cannot be made plainer by explanation. They give, expressly, the right "to sue and be sued," "in every circuit court of the United States," and it would be difficult to substitute other terms which would be more direct and appropriate for the purpose. The argument of the appellants is founded on the opinion of this court in *The Bank of the United States* v. *Deveaux* (5 Cranch, 85). In that case it was decided that the former bank of the United States was not enabled, by the act which incorporated it, to sue in the federal courts. The words of the third section of that act are, that the bank may "sue and be sued," &c., "in courts of record, or any other place whatsoever." The court was of opinion that these general words, which are used in all acts of incorporation, gave only a general capacity to sue, not a particular privilege to sue in the courts of the United States; and this opinion was strengthened by the circumstance that the ninth rule of the seventh section of the same act subjects the directors, in case of excess in contracting debt, to be sued, in their private capacity, "in any court of record of the United States, or either of them." The express grant of jurisdiction of the federal courts, in this case, was considered as having some influence on the construction of the general words of the third section, which does not mention those courts. Whether this decision be right or wrong, it amounts

only to a declaration that a general capacity in the bank to sue, without mentioning the courts of the union, may not give a right to sue in those courts. To infer from this that words expressly conferring a right to sue in those courts do not give the right is surely a conclusion which the premises do not warrant.

The act of incorporation, then, confers jurisdiction on the circuit courts of the United States, if congress can confer it.

2. We will now consider the constitutionality of the clause in the act of incorporation which authorizes the bank to sue in the federal courts.

In support of this clause it is said that the legislative, executive, and judicial powers of every well constructed government are coextensive with each other; that is, they are potentially coextensive. The executive department may constitutionally execute every law which the legislature may constitutionally make, and the judicial department may receive from the legislature the power of construing every such law. All governments, which are not extremely defective in their organization, must possess within themselves the means of expounding, as well as enforcing, their own laws. If we examine the constitution of the United States, we find that its framers kept this great political principle in view. The second article vests the whole executive power in the president; and the third article declares "that the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States.

9 Wh. 819.

The suit of *The Bank of the United States* v. *Osborn and others* is a case, and the question is whether it arises under a law of the United States.

The appellants contend that it does not, because several questions may arise in it which depend on the general principles of the law, not on any act of congress.

If this were sufficient to withdraw a case from the jurisdiction of the federal courts, almost every case, although involving the construction of a law, would be withdrawn; and a clause in the constitution, relating to a subject of vital importance to the government, and expressed in the most comprehensive terms, would be construed to mean almost nothing. There is scarcely any case every part of which depends on the constitution, laws, or treaties of the United States. The questions, whether the fact alleged as the foundation of the action be real or fictitious; whether the conduct of the plaintiff has been such as to entitle him to maintain his action; whether his right is barred; whether he has received satisfaction, or has in any manner released his claims, are questions some or all of which may occur in almost every case; and if their existence be sufficient to arrest the jurisdiction of the court, words which seem intended to be as extensive as the constitution, laws, and treaties of the union, which seem designed to give the courts of the government the construction of all its acts, so far as they affect the rights of individuals, would be reduced to almost nothing.

In those cases in which original jurisdiction is given to the supreme court, the judicial power of the United States cannot be exercised in its appellate form. In every other case the power is to be exercised in its original, or appellate form, or both, as the wisdom of congress may direct. With the exception of these cases, in which original jurisdiction is given to this court, there is none, to which the judicial power extends, from which the original jurisdiction of the inferior courts is excluded by the constitution. Original jurisdiction, so far as the constitution gives a rule, is coextensive with the judicial power. We find in the constitution no prohibition to its exercise in every

9 Wh. 820.

case in which the judicial power can be exercised. It would be a very bold construction to say that this power could be applied, in its appellate form only, to the most important class of cases to which it is applicable.

The constitution establishes the supreme court, and defines its jurisdiction. It enumerates cases in which its jurisdiction is original and exclusive; and then defines that which is appellate, but does not insinuate, that in any such case, the power cannot be exercised in its original form by courts of original jurisdiction. It is not insinuated that the judicial power, in cases depending on the character of the cause, cannot be exercised in the first instance, in the courts of the union, but must first be exercised in the tribunals of the state; tribunals over which the government of the union has no adequate control, and which may be closed to any claim asserted under a law of the United States.

We perceive, then, no ground on which the proposition can be maintained that congress is incapable of giving the circuit courts original jurisdiction in any case to which the appellate jurisdiction extends.

We ask, then, if it can be sufficient to exclude this jurisdiction, that the case involves questions depending on general principles? A cause may depend on several questions of fact and law. Some of these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction, that the title or right set up by the party may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this which gives that jurisdiction. Those other questions cannot arrest the proceedings. Under this construction, the judicial power of the union extends effectively and beneficially to that most important class of cases which depend on the character of the cause. On the opposite construction, the judicial power never can be extended

*9 Wh. 821.

to a whole case, as expressed by the constitution, but to those parts of cases only which present the particular question involving the construction of the constitution or the law. We say it never can be extended to the whole case, because, if the circumstance, that other points are involved in it, shall disable congress from authorizing the courts of the union to take jurisdiction of the original cause, it equally disables congress from authorizing those courts to take jurisdiction of the whole cause, on an appeal, and thus will be restricted to a single question in that cause; and words obviously intended to secure, to those who claim rights under the constitution, laws, or treaties of the United States, a trial in the federal courts, will be restricted to the insecure remedy of an appeal upon an insulated point, after it has received that shape which may be given to it by another tribunal into which he is forced against his will.

We think, then, that, when a question, to which the judicial power of the union is extended by the constitution, forms an ingredient of the original cause, it is in the power of congress to give the circuit courts jursdiction of that cause, although other questions of fact or of law may be involved in it.

The case of the bank is, we think, a very strong case of this description. The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law. Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law ?

Take the case of a contract, which is put as the strongest against the bank.

When a bank sues, the first question, which presents itself,

and which lies at the foundation of the cause, is, Has this legal entity a right to sue? Has it a right to come, not into this court particularly, but into any court? This depends on a law of the United States. The next question is, Has this being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States. These are important questions, and they exist in every possible case. The right to sue, if decided once, is decided forever; but the power of congress was exercised antecedently to the first decision on that right, and if it was constitutional then, it cannot cease to be so, because the particular question is decided. It may be revived at the will of the party, and most probably would be renewed, were the tribunal to be changed. But the question respecting the right to make a particular contract, or to acquire a particular property, or to sue on account of a particular injury, belongs to every particular case, and may be renewed in every case. The question forms an original ingredient in every cause. Whether it be in fact relied on or not, in the defence, it is still a part of the cause, and may be relied on. The right of the plaintiff to sue cannot depend on the defence which the defendant may choose to set up. His right to sue is anterior to that defence, and must depend on the state of things when the action is brought. The questions which the case involves, then, must determine its character, whether those questions be made in the cause or not.

The appellants say that the case arises on the contract; but the validity of the contract depends on a law of the United States, and the plaintiff is compelled, in every case, to show its validity. The case arises emphatically under the law. The act of congress is its foundation. The contract could never have been made, but under the authority of that act. The act itself is the first ingredient in the case, is its origin, is that from which every other part arises. That other questions may also arise, as the execution of the contract, or its performance, cannot change the case, or give it any other origin than the charter

9 Wh. 824.

of incorporation. The action still originates in, and is sustained by, that charter.

The clause, giving the bank a right to sue in the circuit courts of the United States, stands on the same principle with the acts authorizing officers of the United States, who sue in their own names, to sue in the courts of the United States. The postmaster general, for example, cannot sue under that part of the constitution which gives jurisdiction to the federal courts in consequence of the character of the party, nor is he authorized to sue by the judiciary act. He comes into the courts of the union under the authority of an act of congress, the constitutionality of which can only be sustained by the admission that his suit is a case arising under a law of the United States. If it be said that it is such a case, because a law of the United States authorizes the contract, and authorizes the suit, the same reasons exist with respect to a suit brought by the bank. That, too, is such a case; because that suit, too, is itself authorized, and is brought on a contract authorized by a law of the United States. It depends absolutely on that law, and cannot exist a moment without its authority.

If it be said that a suit brought by the bank may depend, in fact, altogether on questions unconnected with any law of the United States, it is equally true with respect to suits brought by the postmaster general. The plea in bar may be payment, if the suit be brought on a bond, or non-assumpsit, if it be brought on an open account, and no other question may arise than what respects the complete discharge of the demand. Yet the constitutionality of the act authorizing the postmaster general to sue in the courts of the United States has never been drawn into question. It is sustained singly by an act of congress, standing on that construction of the constitution which asserts the right of the legislature to give original jurisdiction to the circuit courts, in cases arising under a law of the United States.

The clause in the patent law, authorizing suits in the circuit courts, stands, we think, on the same principle. Such a suit is

9 Wh. 825.

a case arising under a law of the United States. Yet the defendant may not, at the trial, question the validity of the patent, or make any point which requires the construction of an act of congress. He may rest his defence exclusively on the fact that he has not violated the right of the plaintiff. That this fact becomes the sole question made in the cause cannot oust the jurisdiction of the court, or establish the position that the case does not arise under a law of the United States.

It is said that a clear distinction exists between the party and the cause; that the party may originate under a law with which the cause has no connexion; and that congress may, with the same propriety, give a naturalized citizen, who is the mere creature of a law, a right to sue in the courts of the United States, as give that right to the bank.

This distinction is not denied; and if the act of congress was a simple act of incorporation, and contained nothing more, it might be entitled to great consideration. But the act does not stop with incorporating the bank. It proceeds to bestow upon the being it has made all the faculties and capacities which that being possesses. Every act of the bank grows out of this law, and is tested by it. To use the language of the constitution, every act of the bank arises out of this law.

A naturalized citizen is indeed made a citizen under an act of congress, but the act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize congress to enlarge or abridge those rights. The simple power of the national legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The constitution then takes him up, and, among other rights, extends to him the capacity of suing in the courts of the United States, precisely under the same circumstances under which a native might sue. He is distinguishable in nothing from a native citizen, except so far as the constitution makes the distinction. The law makes none.

9 Wh. 827.

There is, then, no resemblance between the act incorporating the bank and the general naturalization law.

Upon the best consideration we have been able to bestow on this subject, we are of opinion that the clause in the act of incorporation, enabling the bank to sue in the courts of the United States, is consistent with the constitution, and to be obeyed in all courts.

Judge Marshall next goes into the merits of the case; but of the seven points made the two last only are constitutional. We give his opinion on those :—

6. We proceed now to the sixth point made by the appellants, which is, that, if any case is made in the bill, proper for the interference of a court of chancery, it is against the state of Ohio, in which case the circuit court could not exercise jurisdiction.

The bill is brought, it is said, for the purpose of protecting the bank in the exercise of a franchise granted by a law of the United States, which franchise the state of Ohio asserts a right to invade, and is about to invade. It prays the aid of the court to restrain the officers of the state from executing the law. It is, then, a controversy between the bank and the state of Ohio. The interest of the state is direct and immediate, not consequential. The process of the court, though not directed against the state by name, acts directly upon it by restraining its officers. The process, therefore, is substantially, though not in form, against the state, and the court ought not to proceed without making the state a party. If this cannot be done, the court cannot take jurisdiction of the cause.

The full pressure of this argument is felt, and the difficulties it presents are acknowledged. The direct interest of the state in the suit, as brought, is admitted; and had it been in the power of the bank to make it a party, perhaps no decree ought to have been pronounced in the cause, until the state was before the court. But this was not in the power of the bank. The eleventh

9 Wh. 846.

amendment of the constitution has exempted a state from the suits of citizens of other states, or aliens; and the very difficult question is to be decided, whether, in such a case, the court may act upon the agents employed by the state, and on the property in their hands.

Before we try this question by the constitution, it may not be time misapplied, if we pause for a moment, and reflect on the relative situation of the union with its members, should the objection prevail.

A denial of jurisdiction forbids all inquiry into the nature of the case. It applies to cases perfectly clear in themselves; to cases where the government is in the exercise of its best established and most essential powers, as well as to those which may be deemed questionable. It asserts that the agents of a state, alleging the authority of a law void in itself, because repugnant to the constitution, may arrest the execution of any law in the United States. It maintains that, if a state shall impose a fine or penalty on any person employed in the execution of any law of the United States, it may levy that fine or penalty by a ministerial officer, without the sanction even of its own courts; and that the individual, though he perceives the approaching danger, can obtain no protection from the judicial department of the government. The carrier of the mail, the collector of the revenue, the marshal of a district, the recruiting officer, may all be inhibited, under ruinous penalties, from the performance of their respective duties; the warrant of a ministerial officer may authorize the collection of these penalties, and the person thus obstructed in the performance of his duty may indeed resort to his action for damages, after the infliction of the injury, but cannot avail himself of the preventive justice of the nation to protect him in the performance of his duties. Each member of the union is capable, at its will, of attacking the nation, of arresting its progress at every step, of acting vigorously and effectually in the execution of its designs; while the nation stands naked, stripped of its defensive armor, and incapable of shielding its agent or executing its laws, otherwise

than by proceedings which are to take place after the mischief is perpetrated, and which must often be ineffectual, from the inability of the agents to make compensation.

These are said to be extreme cases; but the case at bar, had it been put by way of illustration in argument, might have been termed an extreme case; and if a penalty on a revenue officer, for performing his duty, be more obviously wrong than a penalty on the bank, it is a difference in degree, not in principle. Public sentiment would be more shocked by the infliction of a penalty on a public officer, for the performance of his duty, than by the infliction of this penalty on a bank, which, while carrying on the fiscal operations of the government, is also transacting its own business; but, in both cases, the officer levying the penalty acts under a void authority, and the power to restrain him is denied as positively in the one as in the other.

The distinction between any extreme case and that which has actually occurred, if, indeed, any difference of principle can be supposed to exist between them, disappears when considering the question of jurisdiction: for, if the courts of the United States cannot rightfully protect the agents, who execute every law authorized by the constitution, from the direct action of state agents in the collection of penalties, they cannot rightfully protect those who execute any law.

The question, then, is, whether the constitution of the United States has provided a tribunal which can peacefully and rightfully protect those, who are employed in carrying into execution the laws of the union, from the attempts of a particular state to resist the execution of those laws.

The state of Ohio denies the existence of this power, and contends that no preventive proceedings whatever, or proceedings against the very property which may have been seized by the agent of a state, can be sustained against such agent, because they would be substantially against the state itself, in violation of the eleventh amendment of the constitution.

That the courts of the union cannot entertain a suit brought against a state by an alien, or the citizen of another state, is

not to be controverted. Is a suit, brought against an individual for any cause whatever, a suit against a state, in the sense of the constitution ?

The eleventh amendment is the limitation of a power supposed to be granted in the original instrument; and to understand accurately the extent of the limitation, it seems proper to define the power that is limited.

The words of the constitution, so far as they respect this question, are, "The judicial power shall extend to controversies between two or more states, between a state and citizens of another state, and between a state and foreign states, citizens, or subjects."

A subsequent clause distributes the power previously granted, and assigns to the supreme court original jurisdiction in those cases in which "a state shall be a party."

The words of the eleventh amendment are, "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of a foreign state."

The Bank of the United States contends, that, in all cases in which jurisdiction depends on the character of the party, reference is made to the party on the record, not to one who may be interested, but is not shown by the record to be a party.

The appellants admit that the jurisdiction of the court is not ousted by any incidental or consequential interest which a state may have in the decision to be made, but is to be considered as a party where the decision acts directly and immediately upon the state through its officers.

If this question were to be determined on the authority of English decisions, it is believed that no case can be adduced where any person has been considered as a party who is not made so in the record. But the court will not review those decisions, because, it is thought, a question, growing out of the constitution of the United States, requires rather an attentive consideration of the words of that instrument than of the decis-

9 Wh. 850.

ions of analogous questions by the courts of any other country.

Do the provisions, then, of the American constitution, respecting controversies to which a state may be a party, extend, on a fair construction of that instrument, to cases in which the state is not a party on the record?

The first in the enumeration is a controversy between two or more states.

There are not many questions in which a state would be supposed to take a deeper or more immediate interest than in those which decide on the extent of her territory. Yet the constitution, not considering the state as a party to such controversies, if not plaintiff or defendant on the record, has expressly given jurisdiction in those between citizens claiming lands under grants of different states. If each state, in consequence of the influence of a decision on her boundary, had been considered by the framers of the constitution as a party to that controversy, the express grant of jurisdiction would have been useless. The grant of it certainly proves that the constitution does not consider the state as a party in such a case.

Jurisdiction is expressly granted in those cases only where citizens of the same state claim lands under grants of different states. If the claimants be citizens of different states, the court takes that jurisdiction for that reason. Still, the right of the state to grant is the essential point in dispute; and in that point the state is deeply interested. If that interest converts the state into a party, there is an end of the cause; and the constitution will be construed to forbid the circuit courts to take cognizance of questions to which it was thought necessary expressly to extend their jurisdiction, even when the controversy arose between citizens of the same state.

We are aware that the application of these cases may be denied, because the title of the state comes on incidentally, and the appellants admit the jurisdiction of the court where its judgment does not act directly upon the property or interests of the state; but we deemed it of some importance to show that the framers of the constitution contemplated the distinction be-

tween cases in which a state was interested, and those in which it was a party, and made no provision for a case of interest without being a party on the record.

In cases where a state is a party on the record the question of jurisdiction is decided by inspection. If jurisdiction depend not on this plain fact, but on the interest of the state, what rule has the constitution given by which this interest is to be measured? If no rule be given, is it to be settled by the court? If so, the curious anomaly is presented of a court examining the whole testimony of a cause, inquiring into, and deciding on, the extent of a state's interest, without having a right to exercise any jurisdiction in the case. Can this inquiry be made without the exercise of jurisdiction?

The next in the enumeration is a controversy between a state and the citizens of another state.

Can this case arise, if the state be not a party on the record? If it can, the question recurs, What degree of interest shall be sufficient to change the parties, and arrest the proceedings against the individual? Controversies respecting boundary have lately existed between Virginia and Tennessee, between Kentucky and Tennessee, and now exist between New York and New Jersey. Suppose, while such a controversy is pending, the collecting officer of one state should seize property for taxes belonging to a man who supposes himself to reside in the other state, and who seeks redress in the federal court of that state in which the officer resides. The interest of the state is obvious. Yet it is admitted that in such a case the action would lie, because the officer might be treated as a trespasser, and the verdict and judgment against him would not act directly on the property of the state. That it would not so act may, perhaps, depend on circumstances. The officer may retain the amount of the taxes in his hands, and, on the proceedings of the state against him, may plead, in bar, the judgment of a court of competent jurisdiction. If this plea ought to be sustained, and it is far from being certain that it ought not, the judgment so pleaded would have acted directly

9 Wh. 853.

on the revenue of the state in the hands of its officer. And yet the argument admits that the action in such a case would be sustained. But suppose, in such a case, the party conceiving himself to be injured, instead of bringing an action sounding in damages, should sue for the specific thing, while yet in possession of the seizing officer? It being admitted, in argument, that the action sounding in damages would lie, we are unable to perceive the line of distinction between that and the action of detinue. Yet the latter action would claim the specific article seized for the tax, and would obtain it, should the seizure be deemed unlawful.

It would be tedious to pursue this part of the inquiry farther, and it would be useless, because every person will perceive that the same reasoning is applicable to all the other enumerated controversies to which a state may be a party. The principle may be illustrated by a reference to those other controversies where jurisdiction depends on the party. But before we review them, we will notice one where the nature of the controversy is in some degree blended with the character of the party.

If a suit be brought against a foreign minister, the supreme court alone has original jurisdiction, and this is shown on the record. But suppose a suit to be brought which affects the interest of a foreign minister, or by which the person of his secretary, or of his servant, is arrested. The minister does not, by the mere arrest of his secretary, or his servant, become a party to this suit, but the actual defendant pleads to the jurisdiction of the court, and asserts his privilege. If the suit affects a foreign minister, it must be dismissed, not because he is a party to it, but because it affects him. The language of the constitution in the two cases is different. This court can take cognizance of all cases "affecting" foreign ministers; and, therefore, jurisdiction does not depend on the party named in the record. But this language changes, when the enumeration proceeds to states. Why this change? The answer is obvious. In the case of foreign ministers, it was intended, for reasons which all comprehend, to give the national courts jurisdiction over all

cases by which they were in any manner affected. In the case of states, whose immediate or remote interests were mixed up with a multitude of cases, and who might be affected in an almost infinite variety of ways, it was intended to give jurisdiction in those cases only to which they were actual parties.

In proceeding with the cases in which jurisdiction depends on the character of the party, the first in the enumeration is "controversies to which the United States shall be a party."

Does this provision extend to the cases where the United States are not named in the record, but claim, and are actually entitled to, the whole subject in controversy?

Let us examine this question.

Suits brought by the postmaster general are for money due to the United States. The nominal plaintiff has no interest in the controversy, and the United States are the only real party. Yet these suits could not be instituted in the courts of the union, under that clause which gives jurisdiction in all cases to which the United States are a party; and it was found necessary to give the court jurisdiction over them, as being cases arising under a law of the United States.

The judicial power of the union is also extended to controversies between citizens of different states; and it has been decided that the character of the parties must be shown on the record. Does this provision depend on the character of those whose interest is litigated, or of those who are parties on the record? In a suit, for example, brought by or against an executor, the creditors or legatees of his testator are the persons really concerned in interest; but it has never been suspected, that, if the executor be a resident of another state, the jurisdiction of the federal courts could be ousted by the fact that the creditors or legatees were citizens of the same state with the opposite party. The universally received construction in this case is, that jurisdiction is neither given nor ousted by the relative situation of the parties concerned in interest, but by the relative situation of the parties named on the record. Why is this construction universal? No case can be imagined in which

9 Wh. 855.

the existence of an interest out of the party on the record is more unequivocal than in that which has been just stated. Why, then, is it universally admitted that this interest in no manner affects the jurisdiction of the court? The plain and obvious answer is, because the jurisdiction of the court depends not upon this interest, but upon the actual party on the record.

Were a state to be the sole legatee, it will not, we presume, be alleged that the jurisdiction of the court, in a suit against the executor, would be more affected by this fact than by the fact that any other person, not suable in the courts of the union, was the sole legatee. Yet, in such a case, the court would decide directly and immediately on the interest of the state.

This principle might be further illustrated by showing that jurisdiction, where it depends on the character of the party, is never conferred in consequence of the existence of an interest in a party not named; and by showing, that, under the distributive clause of the second section of the third article, the supreme court could never take original jurisdiction in consequence of an interest in a party not named in the record.

But the principle seems too well established to require that more time should be devoted to it. It may, we think, be laid down, as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the eleventh amendment, which restrains the jurisdiction granted by the constitution over suits against states, is, of necessity, limited to those suits in which a state is a party on the record. The amendment has its full effect, if the constitution be construed as it would have been construed, had the jurisdiction of the court never been extended to suits brought against a state by the citizens of another state, or by aliens.

The state not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties.

9 Wh. 857.

In pursuing the arrangement which the appellants have made for the argument of the cause, this question has already been considered. The responsibility of the officers of the state for the money taken out of the bank was admitted, and it was acknowledged that this responsibility might be enforced by the proper action. The objection is to its being enforced against the specific article taken, and by the decree of this court. But it has been shown, we think, that an action of detinue might be maintained for that article, if the bank had possessed the means of describing it, and that the interest of the state would not have been an obstacle to the suit of the bank against the individual in possession of it. The judgment in such a suit might have been enforced, had the article been found in possession of the individual defendant. It has been shown that the danger of its being parted with, of its being lost to the plaintiff, and the necessity of a discovery, justified the application to a court of equity. It was in a court of equity alone that the relief would be real, substantial, and effective. The parties must certainly have a real interest in the case, since their personal responsibility is acknowledged, and, if denied, could be demonstrated.

It was proper, then, to make a decree against the defendants in the circuit court, if the law of the state of Ohio be repugnant to the constitution, or to a law of the United States made in pursuance thereof, so as to furnish no authority to those who took, or to those who received, the money for which this suit was instituted.

7. Is that law unconstitutional?

This point was argued with great ability, and decided by this court, after mature and deliberate consideration, in the case of *M'Culloch* v. *The State of Maryland.* A revision of that opinion has been requested; and many considerations combine to induce a review of it.

The foundation of the argument in favor of the right of a state to tax the bank is laid in the supposed character of that institution. The argument supposes the corporation to have

9 Wh. 858.

been originated for the management of an individual concern, to be founded upon contract between individuals, having private trade and private profit for its great end and principal object.

If these premises were true, the conclusion drawn from them would be inevitable. This mere private corporation, engaged in its own business, with its own views, would certainly be subject to the taxing power of the state, as any individual would be; and the casual circumstance of its being employed by the government in the transaction of its fiscal affairs would no more exempt its private business from the operation of that power than it would exempt the private business of any individual employed in the same manner. But the premises are not true. The bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connexion with the government, is admitted; but the bank is not such an individual or company. It was not created for its own sake, or for private purposes. It has never been supposed that congress could create such a corporation. The whole opinion of the court, in the case of *M'Culloch* v. *The State of Maryland*, is founded on, and sustained by, the idea that the bank is an instrument which is "necessary and proper for carrying into effect the powers vested in the government of the United States." It is not an instrument which the government found ready made, and has supposed to be adapted to its purposes; but one which was created, in the form in which it now appears, for national purposes only. It is, undoubtedly, capable of transacting private as well as public business. While it is the great instrument by which the fiscal operations of the government are effected, it is also trading with individuals for its own advantage. The appellants endeavor to distinguish between this trade and its agency for the public, between its banking operations and those qualities which it possesses in common with every corporation, such as

9 Wh. 860.

individuality, immortality, &c. While they seem to admit the right to preserve this corporate existence, they deny the right to protect it in its trade and business.

If there be anything in this distinction, it would tend to show that so much of the act as incorporates the bank is constitutional, but so much of it as authorizes its banking operations is unconstitutional. Congress can make the inanimate body, and employ the machine as a depository of, and vehicle for, the conveyance of the treasure of the nation, if it be capable of being so employed, but cannot breathe into it the vital spirit which alone can bring it into useful existence.

Let this distinction be considered.

Why is it that congress can incorporate or create a bank? This question was answered in the case of *M'Culloch* v. *The State of Maryland.* It is an instrument which is "necessary and proper" for carrying on the fiscal operations of government. Can this instrument, on any rational calculation, effect its object, unless it be endowed with that faculty of lending and dealing in money which is conferred by its charter? If it can, if it be as competent to the purposes of government without as with this faculty, there will be much difficulty in sustaining that essential part of the charter. If it cannot, then this faculty is necessary to the legitimate operations of government, and was constitutionally and rightfully engrafted on the institution. It is, in that view of the subject, the vital part of the corporation; it is its soul; and the right to preserve it originates in the same principle with the right to preserve the skeleton or body which it animates. The distinction between destroying what is denominated the corporate franchise, and destroying its vivifying principle, is precisely as incapable of being maintained as a distinction between the right to sentence a human being to death, and a right to sentence him to a total privation of sustenance during life. Deprive a bank of its trade and business, which is its sustenance, and its immortality, if it have that property, will be a very useless attribute.

This distinction, then, has no real existence. To tax its

9 Wh. 861.

faculties, its trade, and occupation, is to tax the bank itself. To destroy or preserve the one is to destroy or preserve the other.

It is urged that congress has not, by this act of incorporation, created the faculty of trading in money; that it had anterior existence, and may be carried on by a private individual, or company, as well as by a corporation. As this profession or business may be taxed, regulated, or restrained, when conducted by an individual, it may, likewise, be taxed, regulated, or restrained, when conducted by a corporation.

The general correctness of these propositions need not be controverted. Their particular application to the question before the court is alone to be considered. We do not maintain that the corporate character of the bank exempts its operations from the action of state authority. If an individual were to be endowed with the same faculties, for the same purposes, he would be equally protected in the exercise of those faculties. The operations of the bank are believed not only to yield the compensation for its services to the government, but to be essential to the performance of those services. Those operations give its value to the currency in which all the transactions of the government are conducted. They are, therefore, inseparably connected with those transactions. They enable the bank to render those services to the nation for which it was created, and are, therefore, of the very essence of its character, as national instruments. The business of the bank constitutes its capacity to perform its functions, as a machine for the money transactions of the government. Its corporate character is merely an incident, which enables it to transact that business more beneficially.

Were the secretary of the treasury to be authorized by law to appoint agencies throughout the union, to perform the public functions of the bank, and to be endowed with its faculties, as a necessary auxiliary to those functions, the operations of those agents would be as exempt from the control of the states as the bank, and not more so. If, instead of the secretary of the

treasury, a distinct office were to be created for the purpose, filled by a person who should receive, as a compensation for his time, labor, and expense, the profits of the banking business, instead of other emoluments, to be drawn from the treasury, which banking business was essential to the operations of the government, would each state in the union possess a right to control these operations? The question on which this right would depend must always be, Are these faculties so essential to the fiscal operations of the government as to authorize congress to confer them? Let this be admitted, and the question, Does the right to preserve them exist? must always be answered in the affirmative.

Congress was of opinion that these faculties were necessary to enable the bank to perform the services which are exacted from it and for which it was created. This was certainly a question proper for the consideration of the national legislature. But were it now to undergo revision, who would have the hardihood to say, that, without the employment of a banking capital, those services could be performed? That the exercise of these faculties greatly facilitates the fiscal operations of the government is too obvious for controversy; and who will venture to affirm that the suppression of them would not materially affect those operations, and essentially impair, if not totally destroy, the utility of the machine to the government? The currency which it circulates, by means of its trade with individuals, is believed to make it a more fit instrument for the purposes of government than it could otherwise be; and if this be true, the capacity to carry on this trade is a faculty indispensable to the character and objects of the institution.

The appellants admit, that, if this faculty be necessary to make the bank a fit instrument for the purposes of the government, congress possesses the same power to protect the machine in this, as in its direct fiscal operations; but they deny that it is necessary to those purposes, and insist that it is granted solely for the benefit of the members of the corporation. Were this proposition to be admitted, all the consequences which are

drawn from it might follow. But it is not admitted. The court has already stated its conviction, that, without this capacity to trade with individuals, the bank would be a very defective instrument, when considered with a single view to its fitness for the purposes of government. On this point the whole argument rests.

It is contended, that, admitting congress to possess the power, this exemption ought to have been expressly asserted in the act of incorporation; and, not being expressed, ought not to be implied by the court.

It is not unusual for a legislative act to involve consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an act of congress to imply, without expressing, this very exemption from state control, which is said to be so objectionable in this instance. The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples in point. It has never been doubted that all who are employed in them are protected, while in the line of duty; and yet this protection is not expressed in any act of congress. It is incidental to, and is implied in, the several acts by which these institutions are created, and is secured to the individuals employed in them, by the judicial power alone; that is, the judicial power is the instrument employed by the government in administering this security.

That department has no will in any case. If the sound construction of the act be that it exempts the trade of the bank, as being essential to the character of a machine necessary to the fiscal operations of the government, from the control of the states, courts are as much bound to give it that construction as if the exemption had been established in express terms. Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law.

and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature, or, in other words, to the will of the law.

The appellants rely greatly on the distinction between the bank and the public institutions, such as the mint or the post-office. The agents in those offices are, it is said, officers of government, and are excluded from a seat in congress. Not so the directors of the bank. The connexion of the government with the bank is likened to that with contractors.

It will not be contended that the directors or other officers of the bank are officers of government. But it is contended, that, were their resemblance to contractors more perfect than it is, the right of the state to control its operations, if those operations be necessary to its character as a machine employed by the government, cannot be maintained. Can a contractor for supplying a military post with provisions be restrained from making purchases within any state, or from transporting the provisions to the place at which the troops were stationed? or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative. It is true that the property of the contractor may be taxed, as the property of other citizens; and so may the local property of the bank. But we do not admit that the act of purchasing, or of conveying the articles purchased, can be under state control.

If the trade of the bank be essential to its character as a machine for the fiscal operations of the government, that trade must be as exempt from state control as the actual conveyance of the public money. Indeed, a tax bears upon the whole machine, as well upon the faculty of collecting and transmitting the money of the nation as on that of discounting the notes of individuals. No distinction is taken between them.

9 Wh. 866.

Considering the capacity of carrying on the trade of banking as an important feature in the character of this corporation, which was necessary to make it a fit instrument for the objects for which it was created, the court adheres to its decision in the case of *M'Culloch* v. *The State of Maryland*, and is of opinion that the act of the state of Ohio, which is certainly much more objectionable than that of the state of Maryland, is repugnant to a law of the United States made in pursuance of the constitution, and, therefore, void. The counsel for the appellants are too intelligent, and have too much self-respect, to pretend that a void act can afford any protection to the officers who execute it. They expressly admit that it cannot.

It being, then, shown, we think conclusively, that the defendants could derive neither authority nor protection from the act which they executed, and that this suit is not against the state of Ohio within the view of the constitution, the state being no party on the record, the only real question in the cause is, whether the record contains sufficient matter to justify the court in pronouncing a decree against the defendants? That this question is attended with great difficulty has not been concealed or denied. But when we reflect that the defendants, Osborn and Harper, are incontestably liable for the full amount of the money taken out of the bank; that the defendant, Currie, is also responsible for the sum received by him, it having come to his hands with full knowledge of the unlawful means by which it was acquired; that the defendant, Sullivan, is also responsible for the sum specifically delivered to him, with notice that it was the property of the bank, unless the form of having made an entry on the books of the treasury can countervail the fact that it was, in truth, kept untouched, in a trunk, by itself, as a deposit, to await the event of the pending suit respecting it, we may lay it down as a proposition, safely to be affirmed, that all the defendants in the cause were liable in an action at law for the amount of this decree. If the original injunction was properly awarded, for the reasons stated in the preceding part of this opinion, the money having reached the hands of all those

9 Wh. 868.

to whom it afterwards came, with notice of that injunction, might be pursued, so long as it remained a distinct deposit, neither mixed with the money of the treasury, nor put into circulation. Were it to be admitted that the original injunction was not properly awarded, still the amended and supplemental bill, which brings before the court all the parties who had been concerned in the transaction, was filed after the cause of action had completely accrued. The money of the bank had been taken, without authority, by some of the defendants, and was detained by the only person who was not an original wrongdoer, in a specific form; so that detinue might have been maintained for it, had it been in the power of the bank to prove the facts which are necessary to establish the identity of the property sued for. Under such circumstances, we think a court of equity may afford its aid, on the ground that a discovery is necessary, and also on the same principle that an injunction issues to restrain a person who has fraudulently obtained possession of negotiable notes from putting them into circulation, or a person having the apparent ownership of stock really belonging to another, from transferring it. The suit, then, might be as well sustained in a court of equity as in a court of law, and the objection, that the interests of the state are committed to subordinate agents, if true, is the unavoidable consequence of exemption from being sued,—of sovereignty. The interests of the United States are sometimes committed to subordinate agents. It was the case in *Hoyt* v. *Gelston*, in the case of *The Apollon*, and in the case of *Doddridge's Lessee* v. *Thompson and Wright*, and in many others. An independent foreign sovereign cannot be sued, and does not appear in court. But a friend of the court comes in, and, by suggestion, gives it to understand that his interests are involved in the controversy. The interests of the sovereign, in such a case, and in every other where he chooses to assert them under the name of the real party to the cause, are as well defended as if he were a party to the record. But his pretensions, where they are not well founded, cannot arrest the right of a party having a right

9 Wh. 869.

to the thing for which he sues. Where the right is in the plaintiff, and the possession in the defendant, the inquiry cannot be stopped by the mere assertion of title in a sovereign. The court must proceed to investigate the assertion, and examine the title. In the case at bar, the tribunal established by the constitution, for the purpose of deciding, ultimately, in all cases of this description, had solemnly determined that a state law imposing a tax on the Bank of the United States was unconstitutional and void, before the wrong was committed for which this suit was brought.

9 Wh. 870.

THE BANK OF THE UNITED STATES v. THE PLANTERS' BANK OF GEORGIA.

FEBRUARY TERM, 1824.

[9 Wheaton's Reports, 904–914.]

The questions in this case are stated fully in the following opinion of the court as given by the chief justice:—

In this case, the petition of the plaintiffs, which, according to the practice of the state of Georgia, is substituted for a declaration, is founded on promissory notes payable to a person named in the notes, "or bearer," and states that the notes were "duly transferred, assigned, and delivered" to the plaintiffs, "who thereby became the lawful bearer thereof, and entitled to payment of the sums therein specified; and that the defendants, in consideration of their liability, assumed," &c.

The Planters' Bank pleads to the jurisdiction of the court, and alleges that it is a corporation of which the state of Georgia, and certain individuals, who are citizens of the same state with some of the plaintiffs, are members. The plea also alleges that the persons to whom the notes mentioned in the petition were made payable were citizens of the state of Georgia, and, therefore, incapable of suing the said bank in a circuit court of the United States; and being so incapable, could not, by transferring the notes to the plaintiffs, enable them to sue in that court.

To this plea the plaintiffs demurred, and the defendants joined in demurrer.

On the argument of the demurrer, the judges were divided on two questions:—

1. Whether the averments in the declaration be sufficient in law to give this court jurisdiction of the cause?

2. Whether, on the pleadings in the same, the plaintiffs be entitled to judgment?

The first question was fully considered by the court in the case of *Osborn* v. *The Bank of the United States*, and it is unnecessary to repeat the reasoning used in that case. We are of opinion that the averments in the declaration are sufficient to give the court jurisdiction of the cause.

2d. The second point is understood to involve two questions :—

1. Does the circumstance, that the state is a corporator, bring this cause within the clause in the constitution which gives jurisdiction to the supreme court where a state is a party, or bring it within the eleventh amendment?

2. Does the fact, that the note is made payable to a citizen of the state of Georgia, or bearer, oust the jurisdiction of the court?

1. Is the state of Georgia a party defendant in this case? If it is, then the suit, had the eleventh amendment never been adopted, must have been brought in the supreme court of the United States. Could this court have entertained jurisdiction in the case?

We think it could not. To have given the supreme court original jurisdiction, the state must be plaintiff or defendant as a state, and must, as a state, be a party on the record. A suit against the Planters' Bank of Georgia is no more a suit against the state of Georgia than against any other individual corporator. The state is not a party, that is, an entire party in the cause.

If this suit could not have been brought originally in the supreme court, it would be difficult to show that it is within the eleventh amendment. That amendment does not purport to do more than to restrain the construction which might otherwise be given to the constitution; and if this case be not one of which the supreme court could have taken original jurisdiction, it is not within the amendment. This is not, we think, a case in which the character of the defendant gives jurisdiction to the court. If it did, the suit could be instituted only in the supreme court. This suit is not to be sustained because the

9 Wh. 906.

Planters' Bank is suable in the federal courts, but because the plaintiff has a right to sue any defendant in that court, who is not withdrawn from its jurisdiction by the constitution, or by law. The suit is against a corporation, and the judgment is to be satisfied by the property of the corporation, not by that of the individual corporators. The state does not, by becoming a corporator, identify itself with the corporation. The Planters' Bank of Georgia is not the state of Georgia, although the state holds an interest in it.

It is, we think, a sound principle, that, when a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. Thus, many states of this union, who have an interest in banks, are not suable even in their own courts; yet they never exempt the corporation from being sued. The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other powers, in the management of the affairs of the corporation, than are expressly given by the incorporating act.

The government of the union held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the bank. The United States was not a party to suits brought by or against the bank, in the sense of the constitution. So with respect to the present bank. Suits brought by or against it are not understood to be brought by or against the United States. The government, by becoming a corporator, lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the charter.

9 Wh. 907.

We think, then, that the Planters' Bank of Georgia is not exempted from being sued in the federal courts by the circumstance that the state is a corporator.

2. We proceed next to inquire whether the jurisdiction of the court is ousted by the circumstance that the notes on which the suit was instituted were made payable to citizens of the state of Georgia.

Without examining, whether in this case the original promise is not to the bearer, the court will proceed to the more general question, whether the bank, as endorsee, may maintain a suit against the maker of a note payable to a citizen of the state. The words of the judiciary act, section eleventh, are, "Nor shall any district or circuit court have cognizance of any suit, to recover the contents of any promissory note, or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange."

This is a limitation on the jurisdiction conferred by the judiciary act. It was apprehended that bonds and notes, given, in the usual course of business, by citizens of the same state to each other, might be assigned to the citizens of another state, and thus render the maker liable to a suit in the federal courts. To remove this inconvenience, the act, which gives jurisdiction to the courts of the union over suits brought by the citizen of one state against the citizen of another, restrains that jurisdiction, where the suit is brought by an assignee, to cases where the suit might have been sustained, had no assignment been made. But the bank does not sue in virtue of any right conferred by the judiciary act, but in virtue of the right conferred by its charter. It does not sue because the defendant is a citizen of a different state from any of its members, but because its charter confers upon it the right of suing its debtors in a circuit court of the United States.

If the bank could not sue a person who was a citizen of the same state with any one of its members, in the circuit court,

this disability would defeat the power. There is, probably, not a commercial state in the union, some of whose citizens are not members of the Bank of the United States. There is, consequently, scarcely a debt due to the bank for which a suit could be maintained in a federal court, did the jurisdiction of the court depend on citizenship. A general power to sue in any circuit court of the United States, expressed in terms obviously intended to comprehend every case, would thus be construed to comprehend no case. Such a construction cannot be the correct one.

We think, then, that the charter gives to the bank a right to sue in the circuit courts of the United States, without regard to citizenship; and that the certificate on both questions must be in favor of the plaintiff.

9 Wh. 910.

POSTMASTER GENERAL *v.* EARLY AND OTHERS.

JANUARY TERM, 1827.

[12 Wheaton's Reports, 136–152.]

Early was postmaster at Savannah, and with the other defendants executed a bond to pay over postages received by him. He did not do this, and was sued with his co-obligors in the circuit court for the district of Georgia by the postmaster general in his own name. He pleaded to the jurisdiction of the court on the ground, that, as the postmaster general had sued in his own name, the United States was not a party to the suit. The opinions of the circuit judges being opposed, the case was certified to the supreme court, the opinion of which was delivered by Chief Justice Marshall, as follows:—

The postoffice department was established at the commencement of the Revolution, under the superintendence of a postmaster general, who was authorized to appoint his deputies, and was made responsible for their conduct. Soon after the adoption of the present government, in September, 1789, congress passed a temporary act, directing that a postmaster general should be appointed, and that his powers, and the regulations of his office, should be the same as they last were, "under the resolutions and ordinances of the last congress." The power of appointing deputies, therefore, and the responsibility for their conduct, still remained with the postmaster general.

This act was continued until the first day of June, 1792. In February, 1792, an act was passed detailing the duties and powers of the postmaster general, and fixing the rates of postage. It directs his deputies to settle at the end of every three months, and to pay up the moneys in their hands; on failure to do which, it becomes the duty of the postmaster general "to

cause a suit to be commenced against the person or persons so neglecting or refusing. And if the postmaster general shall not cause such suit to be commenced within three months from the end of every such three months, the balances due from every such delinquent shall be charged to and recoverable from him." This act was to take effect on the first of June, 1792, and to continue for two years. In May, 1794, a permanent act was passed. It retains the provision requiring the postmaster general to settle quarterly with his deputies, but omits that which makes it his duty to cause suits to be instituted within three months after failure.

In March, 1799, the subject was again taken up, and congress passed an act which retains the clause making it the duty of the deputy postmasters to settle their accounts quarterly, and reinstates that which directs the postmaster general to cause suits to be instituted against delinquents; substituting six months in the place of three after the expiration of the quarter, under the penalty of being himself chargeable with the arrears due from such delinquent. This act declares that all causes of action arising under it may be sued before the judicial courts of the several states and of the several territories of the United States.

In April, 1810, congress passed an act for regulating the postoffice establishment, which enacts, among others things, that all suits, thereafter to be brought for the recovery of debts or balances due to the general postoffice, should be instituted in the name of "the postmaster general of the United States." This act also authorizes all causes of action arising under it to be sued in the courts of the states and territories.

In March, 1815, congress passed "An Act to vest more effectually in the State Courts, and in the District Courts of the United States, Jurisdiction in the Cases therein mentioned."

This act enables the state courts to take cognizance of all suits arising under any law for the collection of any direct tax or internal duties of the United States. The fourth section contains this clause: "And be it further enacted, that the dis-

12 Wh. 145.

trict court of the United States shall have cognizance, concurrent with the courts and magistrates of the several states, and the circuit courts of the United States, of all suits at common law, where the United States, or any officer thereof, under the authority of any act of congress, shall sue, although the debt, claim, or other matter in dispute, shall not amount to one hundred dollars." On these several acts the question of jurisdiction depends.

The suit is brought for money due to the United States; and at any time previous to the act of 1810, the suit for the money, had no bond been taken, might have been brought in the name of the United States. It is not certain, that, independent of the bond, it could have been instituted in the name of any other party. The courts of the United States had, of course, jurisdiction. The laws make it the duty of the postmaster general to "cause suits to be instituted," not to bring them; and it was not until March, 1799, that congress authorized these suits to be instituted in the state courts. It is obvious that the right to institute them in those courts, anterior to the passage of that act, was doubted, at any rate, was not exercised; for it could not have been deemed necessary to give expressly the power to sue in those courts, had the power been admitted to exist, and been commonly exercised. We must suppose, then, that these suits were usually instituted in the courts of the United States; and no doubt could be entertained on the question of jurisdiction, if they were brought, as they certainly might have been, in the name of the United States.

The act of 1810 directed that all suits for debts, or balances, due to the general postoffice, should be brought in the name of the postmaster general. The manner in which this change in the style of the suit might affect jurisdiction was not noticed, and no provision was made for this new state of things. Those debts and balances which were due to the general postoffice were not due to the officer personally, but to the office, and were to be sued for and collected for the United States. The

12 Wh. 145.

money belonged to the nation, not to the individual by whose agency it was to be brought into the treasury. The whole course of opinion and of legislation on this subject is, that, although, for convenience, and to save expense to the debtors, recourse may be had to the state courts for the recovery of small sums, yet a right to resort to the courts of the union in suits for money due to the United States was never intended to be relinquished. If the effect of any provision in a statute be to abolish this jurisdiction, it must be an effect which was neither intended nor foreseen. That construction which will produce a consequence so directly opposite to the whole spirit of our legislation ought to be avoided, if it can be avoided without a total disregard of those rules by which courts of justice must be governed.

If the question had rested solely on the act of 1810, it is probable that the aid of the legislature might have been thought indispensable to the jurisdiction of the federal courts over suits brought for the recovery of debts and balances due to the general postoffice. But it does not rest solely on that act. The act of 1815 contains a clause which does, we think, confer this jurisdiction. It cannot be doubted that this clause vests jurisdiction expressly in the district courts, in all suits at common law where any officer of the United States sues under the authority of any act of congress. The postmaster general is an officer of the United States, who sues under the authority of the act of 1810, which makes it his duty to sue for debts and balances due to the office he superintends, and obliges him to sue in his own name.

It has been contended that this clause, if it gives jurisdiction, gives it only where the demand is under one hundred dollars. We do not think the words will sustain this criticism.

The right to take cognizance of suits brought by any officer of the United States, under authority of any act of congress, is first given in general words, comprehending sums to any amount. The limitation which follows is not a proviso that the sum shall not exceed the sum of one hundred dollars; it is no

12 Wh. 146.

restriction on the previous grant, but an enlargement of it, if an enlargement should be thought necessary. This act might be construed in connexion with the judiciary act of 1789, and a general clause giving jurisdiction might be limited as to amount to the sum mentioned in the ninth section of that act. The subsequent words, therefore, of the section we are considering, were introduced for the purpose of obviating this construction, and removing the doubt, which might otherwise exist, of the right to take cognizance of sums less than one hundred dollars. After giving the jurisdiction generally, the words are, "*although* the debt, claim, or other matter in dispute, shall not amount to one hundred dollars." These words do not confine the jurisdiction previously given to one hundred dollars, but prevent it from stopping at that sum.

The jurisdiction of the district courts, then, over suits brought by the postmaster general for debts and balances due the general postoffice, is unquestionable. Has the circuit court jurisdiction?

The language of the act is "that the district court shall have cognizance concurrent with the courts and magistrates of the several states, and the circuit courts of the United States, of all suits," &c. What is the meaning and purport of the words "concurrent with" the circuit courts of the United States? Are they entirely senseless? Are they to be excluded from the clause in which the legislature has inserted them, or are they to be taken into view, and allowed the effect of which they are capable?

The words are certainly not senseless. They have a plain and obvious meaning. And it is, we think, a rule, that words which have a meaning are not to be entirely disregarded in construing a statute. We cannot understand this clause as if these words were excluded from it. They, perhaps, manifest the opinion of the legislature that the jurisdiction was in the circuit courts; but ought, we think, to be construed to give it, if it did not previously exist. Any other construction would destroy the effect of those words. The district court cannot

12 Wh. 147.

take cognizance concurrent with the circuit courts, unless the circuit courts can take cognizance of the same suits. For one body to do a thing concurrently with another is to act in conjunction with that other; it is equivalent to saying, the one may act *together with* the other. The phrase may imply that power was previously given to that other; but if, in fact, it had not been given, the words are capable of imparting it. If they are susceptible of this construction, they ought to receive it, because they will otherwise be totally inoperative, or will contradict the other parts of the sentence, which show plainly the intention that the district court shall have cognizance of the subject, and shall take it to the same extent with the circuit courts.

It has been said, and perhaps truly, that this section was not framed with the intention of vesting jurisdiction in the circuit courts. The title of the act, and the language of the sentence, are supposed to concur in sustaining this proposition. The title speaks only of state and district courts. But it is well settled that the title cannot restrain the enacting clause. It is true that the language of the section indicates the opinion that jurisdiction existed in the circuit courts, rather than an intention to give it; and a mistaken opinion of the legislature concerning the law does not make law.

But if this mistake is manifested in words competent to make the law in future, we know of no principle which can deny them this effect. The legislature may pass a declaratory act, which, though inoperative on the past, may act in future. This law expresses the sense of the legislature on the existing law, as plainly as a declaratory act, and expresses it in terms capable of conferring the jurisdiction. We think, therefore, that, in a case plainly within the judicial power of the federal courts, as prescribed in the constitution, and plainly within the general policy of the legislature, the words ought to receive this construction.

So far as the suits brought by the postmaster general were referred to in argument, in the case of *The Bank of the United States* v. *Osborn*, this construction was assumed as unquestion-

12 Wh. 148.

able. As the act was referred to for the sole purpose of illustrating the argument on the point then under consideration, it was not examined with the attention which has since been bestowed upon it; but the opinion then expressed, that the section we have been considering conferred jurisdiction on the courts of the United States over suits brought by the postmaster general, was correct.

Had this suit been brought to recover the balance due from the deputy postmaster, on his original liability to pay the money in his hands, no doubt would have been felt respecting the jurisdiction of the court. The act of 1810 gives the postmaster general a right to sue for such balances, and the act of 1815 enables him to sue in the circuit or district courts of the United States. But it is contended that he has no right to secure such balances by bond; and, consequently, the bond being unauthorized, the act of congress cannot be construed to authorize a suit upon it.

Were it even true that an official bond cannot be taken in a case where it is not expressly directed by law, we do not think that a bond taken to secure the payment of a sum of money is void, because it is also an official bond. Even supposing this bond to be void, so far as it is intended to stipulate for the performance of official duties, it is not necessarily void, so far as it stipulates for the payment of money of the United States which might come to the hands of the deputy postmaster. That part of the condition, which shows the bond was taken to secure the payment of money which should be received for the United States, is not vitiated by that part of it which shows that it was also taken to secure the general official conduct of the deputy. Now a part of the condition is, expressly, "that, if he shall pay all moneys that shall come to his hands, for the postages of whatsoever is by law chargeable with postage," then the obligation is to be void. The obligation itself, on which the suit is brought, was intended to secure the payment of money collected for the United States, as well as the official conduct of the deputy; and as no law prohibited such an official bond, we

12 Wh. 149.

cannot think, although it might not in itself be valid, that it would destroy an obligation taken for a legitimate purpose. As the breach assigned is altogether in the non-payment of the money collected, we do not think, that, if a bond would be good taken for this single object, it is made bad by being extended also to the official conduct of the obligor.

The inquiry, then, is, whether, under a fair construction of the acts of congress, the postmaster general may take bonds to secure the payment of money due, or which may become due, to the general postoffice.

All the acts relative to the postoffice make it the duty of the postmaster general to superintend the department, to regulate the conduct and duties of his deputies, and to collect the moneys received by them for the general postoffice. May not these powers extend to taking bonds to the officer who is to perform them? May not these bonds be considered as means proper to be used in the collection of debts, and in securing them?

If this interpretation of the words should be too free for a judicial tribunal, yet, if the legislature has made it, if congress has explained its own meaning too unequivocally to be mistaken, their courts may be justified in adopting that meaning.

The twenty-second section of the act of 1799, after directing the postmaster general to sue for all balances due from his deputies, within six months after the expiration of the three months within which they ought to have been paid, enacts "that all suits, which shall be hereafter commenced for the recovery of debts or balances due to the general postoffice, whether they appear by *bond or obligations* made in the name of the existing or any preceding postmaster general, or otherwise, shall be instituted in the name of the postmaster general of the United States."

These words follow immediately the clause which makes it the duty of the postmaster general to sue for the money due from his deputies, and are obviously applied to the moneys in their hands. They show the sense of the legislature, that this

12 Wh. 150.

money may be a "debt" or a "balance," may "appear by bond or obligation," or otherwise; and are, we think, a legislative exposition of the words, describing the power and duty of the postmaster general in the superintendence of his department, and the means he may employ for collecting the money due from his deputies.

The thirty-first section of the same act repeals the previous laws for establishing the postoffice department, after the first day of the ensuing May; and adds a proviso to the repealing clause, that, as to "all bonds, contracts, debts, demands, rights, penalties, or punishments, which have been made, have arisen, or have been incurred," &c., "the said acts shall have the same effect as if this act had not been made."

It is said by the counsel for the defendants, that these words do not give efficacy to the bonds to which they refer, but leave them as they were anterior to the repealing act. This is true. But they explain the sense of the legislature respecting the powers of the postmaster general, and the manner in which he might execute those powers.

An additional proviso extends even to official bonds. After continuing the postmaster general and all his deputies in office, it adds, "and also the bonds, which they or either of them have or may give for the faithful execution of their several duties, shall continue to have the same force and effect, to all intents and purposes, after the first day of May next, as though this act had not been made."

This proviso, also, is no more than a recognition of the validity of those bonds; but it is a recognition of it, and goes the full extent of showing the legislative opinion that they might be taken. The act of 1810 repeals former acts, and contains the same provisions on this subject with the act of 1799.

The court has felt the pressure of this part of the case. There is always difficulty in extending the operation of words beyond their plain import; but the cardinal rule of construction is, that, where any doubt exists, the intent of the legislature, if it can be plainly perceived, ought to be pursued. It is also a

12 Wh. 151.

rule that the whole law is to be taken together, and one part expounded by any other which may indicate the meaning annexed by the legislature itself to ambiguous phrases. The words describing the power and duty of the postmaster general may be expounded by other parts of the act showing the legislative opinion as to their extent; and if this be true, the sections which have been cited cannot be misunderstood. They show plainly that the legislature supposed it had given the postmaster general authority to take these bonds.

A case cannot exist in which effect may be given to the legislative intent more safely than in this. The bonds are taken in a case where no doubt can exist respecting the right and propriety of giving authority to take them; they are for money due to the United States; and the opinion of the legislature that authority was given is expressed in as plain words as can be used. The acts of congress sustain the opinion that they have been taken with the knowledge and approbation of the legislature from the first establishment of the offices; and provision is made by law for their being put in suit. The courts of the United States have, until very lately, uniformly given judgments on them.

Under these circumstances we think ourselves justified in continuing to sustain them, and to certify in this case that the circuit court has jurisdiction of the cause.

12 Wh. 152.

BROWN AND OTHERS *v.* THE STATE OF MARYLAND.

JANUARY TERM, 1827.

[12 Wheaton's Reports, 419–460.]

The facts and point of this case are fully presented in the opinion of the court, as delivered by Chief Justice Marshall as follows:—

This is a writ of error to a judgment rendered in the court of appeals of Maryland, affirming a judgment of the city court of Baltimore, on an indictment found in that court against the plaintiffs in error, for violating an act of the legislature of Maryland. The indictment was founded on the second section of that act, which is in these words: "And be it enacted that all importers of foreign articles or commodities, of dry goods, wares, or merchandise, by bale or package, or of wine, rum, brandy, whiskey, and other distilled spiritous liquors, &c., and other persons selling the same by wholesale, bale, or package, hogshead, barrel, or tierce, shall, before they are authorized to sell, take out a license, as by the original act is directed, for which they shall pay fifty dollars; and in case of neglect or refusal to take out such license, shall be subject to the same penalties and forfeitures as are prescribed by the original act to which this is a supplement." The indictment charges the plaintiffs in error with having imported and sold one package of foreign dry goods without having license to do so. A judgment was rendered against them on demurrer for the penalty which the act prescribes for the offence; and that judgment is now before this court.

The cause depends entirely on the question, whether the legislature of a state can constitutionally require the importer

of foreign articles to take out a license from the state, before he shall be permitted to sell a bale or package so imported.

It has been truly said that the presumption is in favor of every legislative act, and that the whole burden of proof lies on him who denies its constitutionality. The plaintiffs in error take the burden upon themselves, and insist that the act under consideration is repugnant to two provisions in the constitution of the United States.

1. To that which declares that "no state shall, without the consent of congress, lay any imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.

2. To that which declares that congress shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

1. The first inquiry is into the extent of the prohibition upon states "to lay any imposts, or duties on imports or exports." The counsel for the state of Maryland would confine this prohibition to laws imposing duties on the act of importation or exportation. The counsel for the plaintiffs in error give it a much wider scope.

In performing the delicate and important duty of construing clauses in the constitution of our country, which involve conflicting powers of the government of the union and of the respective states, it is proper to take a view of the literal meaning of the words to be expounded, of their connexion with other words, and of the general objects to be accomplished by the prohibitory clause, or by the grant of power.

What, then, is the meaning of the words, "imposts, or duties on imports or exports?"

An impost, or duty on imports, is a custom or a tax levied on articles brought into a country, and is most usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the

12 Wh. 437.

articles, if it were to be levied on them after they were landed. The policy, and consequent practice, of levying or securing the duty before or on entering the port, does not limit the power to that state of things, nor, consequently, the prohibition, unless the true meaning of the clause so confines it. What, then, are "imports?" The lexicons inform us, they are "things imported." If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country. "A duty on imports," then, is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country. The succeeding words of the sentence which limit the prohibition show the extent in which it was understood. The limitation is, "except what may be absolutely necessary for executing its inspection laws." Now, the inspection laws, so far as they act upon articles for exportation, are generally executed on land, before the article is put on board the vessel; so far as they act upon importations, they are generally executed upon articles which are landed. The tax or duty of inspection, then, is a tax which is frequently, if not always, paid for service performed on land, while the article is in the bosom of the country. Yet this tax is an exception to the prohibition on the states to lay duties on imports or exports. The exception was made because the tax would otherwise have been within the prohibition.

If it be a rule of interpretation to which all assent, that the exception of a particular thing from general words proves, that, in the opinion of the lawgiver, the thing excepted would be within the general clause had the exception not been made, we know no reason why this general rule should not be as applicable to the constitution as to other instruments. If it be applicable, then this exception in favor of duties for the support of inspection laws goes far in proving that the framers of the constitution classed taxes of a similar character with those im-

12 Wh. 438.

posed for the purposes of inspection with duties on imports and exports, and supposed them to be prohibited.

If we quit this narrow view of the subject, and, passing from the literal interpretation of the words, look to the objects of the prohibition, we find no reason for withdrawing the act under consideration from its operation.

From the vast inequality between the different states of the confederacy, as to commercial advantages, few subjects were viewed with deeper interest, or excited more irritation, than the manner in which the several states exercised, or seemed disposed to exercise, the power of laying duties on imports. From motives which were deemed sufficient by the statesmen of that day, the general power of taxation, indispensably necessary as it was, and jealous as the states were of any encroachment on it, was so far abridged as to forbid them to touch imports or exports, with the single exception which has been noticed. Why are they restrained from imposing these duties? Plainly, because, in the general opinion, the interest of all would be best promoted by placing that whole subject under the control of congress. Whether the prohibition to "lay imposts, or duties on imports or exports," proceeded from an apprehension that the power might be so exercised as to disturb that equality among the states which was generally advantageous, or that harmony between them which it was desirable to preserve, or to maintain unimpaired our commercial connexions with foreign nations, or to confer this source of revenue on the government of the union, or whatever other motive might have induced the prohibition, it is plain that the object would be as completely defeated by a power to tax the article in the hands of the importer the instant it was landed as by a power to tax it while entering the port. There is no difference, in effect, between a power to prohibit the sale of an article and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported, if none could be sold. No object of any description can be accomplished by laying a duty on importation, which may not

12 Wh. 439.

be accomplished with equal certainty by laying a duty on the thing imported in the hands of the importer. It is obvious that the same power which imposes a light duty can impose a very heavy one, one which amounts to a prohibition. Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed. If the tax may be levied in this form by a state, it may be levied to an extent which will defeat the revenue by impost, so far as it is drawn from importations into the particular state. We are told that such wild and irrational abuse of power is not to be apprehended, and is not to be taken into view when discussing its existence. All power may be abused; and if the fear of its abuse is to constitute an argument against its existence, it might be urged against the existence of that which is universally acknowledged, and which is indispensable to the general safety. The states will never be so mad as to destroy their own commerce, or even to lessen it.

We do not dissent from these general propositions. We do not suppose any state would act so unwisely. But we do not place the question on that ground.

These arguments apply with precisely the same force against the whole prohibition. It might, with the same reason, be said that no state would be so blind to its own interests as to lay duties on importation which would either prohibit or diminish its trade. Yet the framers of our constitution have thought this a power which no state ought to exercise. Conceding, to the full extent which is required, that every state would, in its legislation on this subject, provide judiciously for its own interests, it cannot be conceded that each would respect the interests of others. A duty on the imports is a tax on the article, which is paid by the consumer. The great importing states would thus levy a tax on the non-importing states, which would not be less a tax because their interest would afford ample security against its ever being so heavy as to expel commerce from their ports. This would necessarily produce countervailing

12 Wh. 440.

measures on the part of those states whose situation was less favorable to importation. For this, among other reasons, the whole power of laying duties on imports was, with a single and slight exception, taken from the states. When we are inquiring whether a particular act is within this prohibition, the question is not, whether the state may so legislate as to hurt itself, but whether the act is within the words and mischief of the prohibitory clause. It has already been shown that a tax on the article in the hands of the importer is within its words; and we think it too clear for controversy that the same tax is within its mischief. We think it unquestionable that such a tax has precisely the same tendency to enhance the price of the article as if imposed upon it while entering the port.

The counsel for the state of Maryland insist, with great reason, that, if the words of the prohibition be taken in their utmost latitude, they will abridge the power of taxation, which all admit to be essential to the states, to an extent which has never yet been suspected, and will deprive them of resources which are necessary to supply revenue, and which they have heretofore been admitted to possess. These words must, therefore, be construed with some limitation; and, if this be admitted, they insist that entering the country is the point of time when the prohibition ceases, and the power of the state to tax commences.

It may be conceded that the words of the prohibition ought not to be pressed to their utmost extent; that, in our complex system, the object of the powers conferred on the government of the union, and the nature of the often conflicting powers which remain in the states, must always be taken into view, and may aid in expounding the words of any particular clause. But while we admit that sound principles of construction ought to restrain all courts from carrying the words of the prohibition beyond the object the constitution is intended to secure, that there must be a point of time when the prohibition ceases and the power of the state to tax commences; we cannot admit that this point of time is the instant that the articles enter the

12 Wh. 441.

country. It is, we think, obvious that this construction would defeat the prohibition.

The constitutional prohibition on the states to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application. It is sufficient, for the present, to say, generally, that, when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution.

The counsel for the plaintiffs in error contend that the importer purchases, by payment of the duty to the United States, a right to dispose of his merchandise, as well as to bring it into the country; and certainly the argument is supported by strong reason, as well as by the practice of nations, including our own. The object of importation is sale; it constitutes the motive for paying the duties; and if the United States possess the power of conferring the right to sell, as the consideration for which the duty is paid, every principle of fair dealing requires that they should be understood to confer it. The practice of the most commercial nations conforms to this idea. Duties, according to that practice, are charged on those articles only which are intended for sale or consumption in the country. Thus,

sea-stores, goods imported and re-exported in the same vessel, goods landed and carried over land for the purpose of being re-exported from some other port, goods forced in by stress of weather, and landed, but not for sale, are exempted from the payment of duties. The whole course of legislation on the subject shows, that, in the opinion of the legislature, the right to sell is connected with the payment of duties.

The counsel for the defendant in error have endeavored to illustrate their proposition, that the constitutional prohibition ceases the instant the goods enter the country, by an array of the consequences which they suppose must follow the denial of it. If the importer acquires the right to sell by the payment of duties, he may, they say, exert that right when, where, and as he pleases, and the state cannot regulate it. He may sell by retail, at auction, or as an itinerant pedlar. He may introduce articles, as gunpowder, which endanger a city, into the midst of its population; he may introduce articles which endanger the public health, and the power of self-preservation is denied. An importer may bring in goods, as plate, for his own use, and thus retain much valuable property exempt from taxation.

These objections to the principle, if well founded, would certainly be entitled to serious consideration. But we think they will be found, on examination, not to belong necessarily to the principle, and, consequently, not to prove that it may not be resorted to with safety as a criterion by which to measure the extent of the prohibition.

This indictment is against the importer, for selling a package of dry goods in the form in which it was imported, without a license. This state of things is changed, if he sells them, or otherwise mixes them with the general property of the state, by breaking up his packages, and travelling with them as an itinerant pedlar. In the first case the tax intercepts the import, as an import in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the state. It denies to the importer the right of using the

12 Wh. 443.

privilege which he has purchased from the United States, until he shall have also purchased it from the state. In the last cases the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to plate, or other furniture used by the importer.

So, if he sells by auction. Auctioneers are persons licensed by the state, and if the importer chooses to employ them, he can as little object to paying for this service as for any other for which he may apply to an officer of the state. The right of sale may very well be annexed to importation, without annexing to it, also, the privilege of using the officers licensed by the state to make sales in a peculiar way.

The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the states. If the possessor stores it himself out of town, the removal cannot be a duty on imports, because it contributes nothing to the revenue. If he prefers placing it in a public magazine, it is because he stores it there, in his own opinion, more advantageously than elsewhere. We are not sure that this may not be classed among inspection laws. The removal or destruction of infectious or unsound articles is, undoubtedly, an exercise of that power, and forms an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly sanction the health laws of a state.

The principle, then, for which the plaintiffs in error contend, that the importer acquires a right not only to bring the articles into the country, but to mix them with the common mass of property, does not interfere with the necessary power of taxation, which is acknowledged to reside in the states, to that dangerous extent which the counsel for the defendants in error seem to apprehend. It carries the prohibition in the constitution no farther than to prevent the states from doing that which it was the great object of the constitution to prevent.

12 Wh. 443.

But if it should be proved that a duty on the article itself would be repugnant to the constitution, it is still argued that this is not a tax upon the article, but on the person. The state, it is said, may tax occupations, and this is nothing more.

It is impossible to conceal from ourselves that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true, the state may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the state has a right to do, because no constitutional prohibition extends to it. So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the state has not a right to do, because it is prohibited by the constitution.

In support of the argument, that the prohibition ceases the instant the goods are brought into the country, a comparison has been drawn between the opposite words "export" and "import." As "to export," it is said, means only to carry goods out of the country, so "to import" means only to bring them into it. But suppose we extend this comparison to the two prohibitions. The states are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any state. There is some diversity in language, but none is perceivable in the act which is prohibited. The United States have the same right to tax occupations which is possessed by the states. Now, suppose the United States should require every exporter to take out a license, for which he should pay such tax as congress might think proper to impose; would government be permitted to shield itself from the

12 Wh. 444.

just censure to which this attempt to evade the prohibitions of the constitution would expose it, by saying that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations? Or, suppose revenue cutters were to be stationed off the coast for the purpose of levying a duty on all merchandise found in vessels which were leaving the United States for foreign countries; would it be received as an excuse for this outrage, were the government to say that exportation meant no more than carrying goods out of the country, and as the prohibition to lay a tax on imports, or things imported, ceased the instant they were brought into the country, so the prohibition to tax articles exported ceased when they were carried out of the country?

We think, then, that the act under which the plaintiffs in error were indicted is repugnant to that article of the constitution which declares that "no state shall lay any imposts, or duties on imports or exports."

2. Is it also repugnant to that clause in the constitution which empowers "congress to regulate commerce with foreign nations, and among the several states, and with the Indian tribes?"

The oppressed and degraded state of commerce previous to the adoption of the constitution can scarcely be forgotten. It was regulated by foreign nations with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the federal government to enforce them had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great revolution which introduced the

12 Wh. 445.

present system than the deep and general conviction that commerce ought to be regulated by congress. It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the states. To construe the power so as to impair its efficacy would tend to defeat an object in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity.

What, then, is the just extent of a power to regulate commerce with foreign nations, and among the several states?

This question was considered in the case of *Gibbons* v. *Ogden*, (9 Wheaton's Reports, 1,) in which it was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the constitution. The power is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior.

We deem it unnecessary now to reason in support of these propositions. Their truth is proved by facts continually before our eyes, and was, we think, demonstrated, if they could require demonstration, in the case already mentioned.

If this power reaches the interior of a state, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Con-

12 Wh. 446.

gress has a right not only to authorize importation, but to authorize the importer to sell.

If this be admitted, and we think it cannot be denied, what can be the meaning of an act of congress which authorizes importation, and offers the privilege for sale at a fixed price to every person who chooses to become a purchaser? How is it to be construed, if an intent to deal honestly and fairly, an intent as wise as it is moral, is to enter into the construction? What can be the use of the contract, what does the importer purchase, if he does not purchase the privilege to sell?

What would be the language of a foreign government, which should be informed that its merchants, after importing according to law, were forbidden to sell the merchandise imported? What answer would the United States give to the complaints and just reproaches to which such an extraordinary circumstance would expose them? No apology could be received, or even offered. Such a state of things would break up commerce. It will not meet this argument, to say that this state of things will never be produced; that the good sense of the states is a sufficient security against it. The constitution has not confided this subject to that good sense. It is placed elsewhere. The question is, Where does the power reside? not, How far will it be, probably, abused? The power claimed by the state is, in its nature, in conflict with that given to congress; and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence.

We think, then, that, if the power to authorize a sale exists in congress, the conclusion, that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable.

If the principles we have stated be correct, the result to which they conduct us cannot be mistaken. Any penalty inflicted on the importer for selling the article, in his character of importer, must be in opposition to the act of congress which authorizes importation. Any charge on the introduction and incorporation of the articles into and with the mass of property in the

12 Wh. 447.

country must be hostile to the power given to congress to regulate commerce; since an essential part of that regulation, and principal object of it, is to prescribe the regular means for accomplishing that introduction and incorporation.

The distinction between a tax on the thing imported, and on the person of the importer, can have no influence on this part of the subject. It is too obvious for controversy that they interfere equally with the power to regulate commerce.

It has been contended that this construction of the power to regulate commerce, as was contended in construing the prohibition to lay duties on imports, would abridge the acknowledged power of a state to tax its own citizens, or their property within its territory.

We admit this power to be sacred; but cannot admit that it may be used so as to obstruct the free course of a power given to congress. We cannot admit that it may be used so as to obstruct or defeat the power to regulate commerce. It has been observed that the powers remaining with the states may be so exercised as to come in conflict with those vested in congress. When this happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the constitution has applied it to the often interfering powers of the general and state governments, as a vital principle of perpetual operation. It results, necessarily, from this principle, that the taxing power of the states must have some limits. It cannot reach and restrain the action of the national government within its proper sphere. It cannot reach the administration of justice in the courts of the union, or the collection of the taxes of the United States, or restrain the operation of any law which congress may constitutionally pass. It cannot interfere with any regulation of commerce. If the states may tax all persons and property found on their territory, what shall restrain them from taxing goods in their transit through the state from one port to another for the purpose of re-exportation? The laws of trade authorize this operation, and general convenience requires it.

12 Wh. 448.

Or what should restrain a state from taxing any article passing through it from one state to another, for the purpose of traffic? or from taxing the transportation of articles passing from the state itself to another state for commercial purposes? These cases are all within the sovereign power of taxation, but would obviously derange the measures of congress to regulate commerce, and affect materially the purpose for which that power was given. We deem it unnecessary to press this argument farther, or to give additional illustrations of it, because the subject was taken up, and considered with great attention, in *M'Culloch* v. *The State of Maryland*, (4 Wheaton's Reports, 316,) the decision in which case is, we think, entirely applicable to this.

It may be proper to add that we suppose the principles laid down in this case to apply equally to importations from a sister state. We do not mean to give any opinion on a tax discriminating between foreign and domestic articles.

We think there is error in the judgment of the court of appeals of the state of Maryland, in affirming the judgment of the Baltimore city court, because the act of the legislature of Maryland, imposing the penalty for which the said judgment is rendered, is repugnant to the constitution of the United States, and, consequently, void. The judgment is to be reversed, and the cause remanded to that court, with instructions to enter judgment in favor of the appellants.

12 Wh. 449.

AMERICAN INSURANCE COMPANY AND OTHERS v. CANTER.

JANUARY TERM, 1828.

[1 Peters's Reports, 511–546.]

The American Insurance Company insured certain bales of cotton from New Orleans to France. The vessel in which it was shipped was wrecked on the coast of Florida, but the cotton was saved, and sold in order to pay the claim of those who saved it. This sale was made under the order of a territorial court of Florida. The owners having abandoned to the Insurance Company, the Company claimed part of the cotton which went to Charleston, and commenced suit for it in the United States district court, and obtained a judgment in their favor. Canter, who had bought at the sale in Florida, appealed to the circuit court, which reversed the decree of the district court; whereupon the Insurance Company appealed to the supreme court, the opinion of which was delivered by Chief Justice Marshall, as follows :—

The plaintiffs filed their libel in this cause in the district court of South Carolina, to obtain restitution of three hundred and fifty-six bales of cotton, part of the cargo of the ship Point a Petre, which had been insured by them on a voyage from New Orleans to Havre de Grace, in France. The Point a Petre was wrecked on the coast of Florida, the cargo saved by the inhabitants, and carried into Key West, where it was sold for the purpose of satisfying the salvors, by virtue of a decree of a court, consisting of a notary and five jurors, which was erected by an act of the territorial legislature of Florida. The owners abandoned to the underwriters, who, having accepted the same, proceeded against the property; alleging that the sale was not made by order of a court competent to change the property.

1 Pet. 541.

David Canter claimed the cotton as a *bonâ fide* purchaser, under the decree of a competent court, which awarded seventy-six per cent. to the salvors on the value of the property saved.

The district judge pronounced the decree of the territorial court a nullity, and awarded restitution to the libellants of such part of the cargo as he supposed to be identified by the evidence; deducting therefrom a salvage of fifty per cent.

The libellants and claimant both appealed. The circuit court reversed the decree of the district court and decreed the whole cotton to the claimant, with costs, on the ground that the proceedings of the court at Key West were legal, and transferred the property to the purchaser.

From this decree the libellants have appealed to this court.

The cause depends, mainly, on the question, whether the property in the cargo saved was changed by the sale at Key West. The conformity of that sale to the order under which it was made has not been controverted. Its validity has been denied, on the ground that it was ordered by an incompetent tribunal.

The tribunal was constituted by an act of the territorial legislature of Florida, passed on the 4th July, 1823, which is inserted in the record. That act purports to give the power which has been exercised; consequently, the sale is valid, if the territorial legislature was competent to enact the law.

The course which the argument has taken will require, that, in deciding this question, the court should take into view the relation in which Florida stands to the United States.

The constitution confers absolutely on the government of the union the powers of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.

The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it

is annexed; either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it; and the law which may be denominated political is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force, until altered by the newly created power of the state.

On the 2d of February, 1819, Spain ceded Florida to the United States. The sixth article of the treaty of cession contains the following provision: "The inhabitants of the territories, which his Catholic majesty cedes to the United States by this treaty, shall be incorporated in the union of the United States, as soon as may be consistent with the principles of the federal constitution, and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States."

This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities, of the citizens of the United States. It is unnecessary to inquire whether this is not their condition, independent of stipulation. They do not, however, participate in political power; they do not share in the government, till Florida shall become a state. In the mean time Florida continues to be a territory of the United States, governed by virtue of that clause in the constitution which empowers congress "to make all needful rules and regulations respecting the territory, or other property, belonging to the United States."

Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a state, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular state, and

1 Pet. 542.

is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned. In execution of it, congress, in 1822, passed "An Act for the Establishment of a territorial Government in Florida;" and on the 3d of March, 1823, passed another act to amend the act of 1822. Under this act, the territorial legislature enacted the law now under consideration.

The fifth section of the act of 1823 creates a territorial legislature, which shall have legislative powers over all rightful objects of legislation; but no law shall be valid which is inconsistent with the laws and constitution of the United States.

The seventh section enacts, "That the judicial power shall be vested in two superior courts, and in such inferior courts, and justices of the peace, as the legislative council of the territory may from time to time establish." After prescribing the place of session, and the jurisdictional limits of each court, the act proceeds to say: "Within its limits, herein described, each court shall have jurisdiction in all criminal cases, and exclusive jurisdiction in all capital offences, and original jurisdiction in all civil cases of the value of one hundred dollars, arising under, and cognizable by, the laws of the territory, now in force therein, or which may at any time be enacted by the legislative council thereof."

The eighth section enacts, "That each of the said superior courts shall, moreover, have and exercise the same jurisdiction, within its limits, in all cases arising under the laws and constitution of the United States, which, by an Act to establish the Judicial Courts of the United States, approved the 24th of September, 1789, and an Act in addition to the Act entitled an Act to establish the Judicial Courts of the United States, approved the 2d of March, 1793, was vested in the court of Kentucky district."

The powers of the territorial legislature extend to all rightful objects of legislation, subject to the restriction that their laws

shall not be "inconsistent with the laws and constitution of the United States." As salvage is admitted to come within this description, the act is valid, unless it can be brought within the restriction.

The counsel for the libellants contend that it is inconsistent with both the law and the constitution; that it is inconsistent with the provisions of the law by which the territorial government was created, and with the amendatory act of March, 1823. It vests, they say, in an inferior tribunal, a jurisdiction which is by those acts vested exclusively in the superior courts of the territory.

This argument requires an attentive consideration of the sections which define the jurisdiction of the superior courts.

The seventh section of the act of 1823 vests the whole judicial power of the territory "in two superior courts, and in such inferior courts, and justices of the peace, as the legislative council of the territory may from time to time establish." This general grant is common to the superior and inferior courts, and their jurisdiction is concurrent, except so far as it may be made exclusive, in either, by other provisions of the statute. The jurisdiction of the superior courts is declared to be exclusive over capital offences; on every other question over which those courts may take cognizance by virtue of this section, concurrent jurisdiction may be given to the inferior courts. Among these subjects are "all civil cases arising under and cognizable by the laws of the territory, now in force therein, or which may at any time be enacted by the legislative council thereof."

It has been already stated that all the laws which were in force in Florida while a province of Spain, those excepted which were political in their character, which concerned the relations between the people and their sovereign, remained in force until altered by the government of the United States. Congress recognizes this principle, by using the words "laws of the territory, now in force therein." No laws could then have been in force but those enacted by the Spanish government. If among these a law existed on the subject of salvage,

1 Pet. 544.

and it is scarcely possible there should not have been such a law, jurisdiction over cases arising under it was conferred on the superior courts, but that jurisdiction was not exclusive. A territorial act, conferring jurisdiction over the same cases on an inferior court, would not have been inconsistent with this section.

The eighth section extends the jurisdiction of the superior courts, in terms which admit of more doubt. The words are, "That each of the said superior courts shall, moreover, have and exercise the same jurisdiction, within its limits, in all cases arising under the laws and constitution of the United States, which, by an Act to establish the Judicial Courts of the United States, &c., was vested in the court of the Kentucky district."

The eleventh section of the act declares, "That the laws of the United States, relating to the revenue and its collection, and all other public acts of the United States, not inconsistent or repugnant to this act, shall extend to, and have full force and effect in, the territory aforesaid."

The laws which are extended to the territory, by this section, were either for the punishment of crime, or for civil purposes. Jurisdiction is given in all criminal cases by the seventh section; but in civil cases, that section gives jurisdiction only in those which arise under and are cognizable by the laws of the territory; consequently, all civil cases, arising under the laws which are extended to the territory by the eleventh section, are cognizable in the territorial courts by virtue of the eighth section; and in those cases, the superior courts may exercise the same jurisdiction as is exercised by the court for the Kentucky district.

The question suggested by this view of the subject, on which the case under consideration must depend, is this :—

Is the admiralty jurisdiction of the district courts of the United States vested in the superior courts of Florida under the words of the eighth section, declaring that each of the said courts "shall, moreover, have and exercise the same jurisdiction, within its limits, in all cases arising under the laws and

1 Pet. 544.

constitution of the United States, which was vested in the court of the Kentucky district?"

It is observable that this clause does not confer on the territorial courts all the jurisdiction which is vested in the court of the Kentucky district, but that part of it only which applies to "cases arising under the laws and constitution of the United States." Is a case of admiralty of this description?

The constitution and laws of the United States give jurisdiction to the district courts over all cases in admiralty; but jurisdiction over the case does not constitute the case itself. We are, therefore, to inquire whether cases in admiralty, and cases arising under the laws and constitution of the United States, are identical.

If we have recourse to that pure fountain from which all the jurisdiction of the federal courts is derived, we find language employed which cannot well be misunderstood. The constitution declares that "the judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, or other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction."

The constitution certainly contemplates these as three distinct classes of cases; and if they are distinct, the grant of jurisdiction over one of them does not confer jurisdiction over either of the other two. The discrimination made between them, in the constitution, is, we think, conclusive against their identity. If it were not so, if this were a point open to inquiry, it would be difficult to maintain the proposition that they are the same. A case in admiralty does not, in fact, arise under the constitution or laws of the United States. These cases are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise. It is not, then, to the eighth section of the territorial law that we are to look for the grant of admiralty and

1 Pet. 545.

maritime jurisdiction to the territorial courts. Consequently, if that jurisdiction is exclusive, it is not made so by the reference to the district court of Kentucky.

It has been contended, that, by the constitution, the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction; and that the whole of this judicial power must be vested "in one supreme court, and in such inferior courts as congress shall from time to time ordain and establish." Hence it has been argued that congress cannot vest admiralty jurisdiction in courts created by the territorial legislature.

We have only to pursue this subject one step further, to perceive that this provision of the constitution does not apply to it. The next sentence declares that "the judges both of the supreme and inferior courts shall hold their offices during good behavior." The judges of the superior courts of Florida hold their offices for four years. These courts, then, are not constitutional courts, in which the judicial power conferred by the constitution on the general government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the constitution; but is conferred by congress, in the execution of those general powers which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised, in the states, in those courts only which are established in pursuance of the third article of the constitution, the same limitation does not extend to the territories. In legislating for them, congress exercises the combined powers of the general and of a state government.

We think, then, that the act of the territorial legislature,

1 Pet. 546.

erecting the court by whose decree the cargo of the Point a Petre was sold, is not "inconsistent with the laws and constitution of the United States," and is valid. Consequently, the sale made in pursuance of it changed the property, and the decree of the circuit court, awarding restitution of the property to the claimant, ought to be affirmed with costs.

1 Pet. 546.

WESTON AND OTHERS *v.* CITY OF CHARLESTON.

JANUARY TERM, 1829.

[2 Peters's Reports, 449–480.]

The city council of Charleston having taxed certain interest-paying stocks, including some issued by the United States for the national debt, Weston, as a holder of such stock, filed a suggestion in the court of common pleas to prohibit the collection of this tax as being unconstitutional. The prohibition being granted, the city council appealed to the constitutional court, the highest in the state, and that having decided the ordinance laying the tax to be constitutional, Weston sued out his writ of error to the supreme court of the United States, the opinion of which was delivered by the chief justice as follows:—

This case was argued on its merits at a preceding term; but a doubt having arisen with the court respecting its jurisdiction in cases of prohibition, that doubt was suggested to the bar, and a reargument was requested. It has been reargued at this term.

The power of this court to revise the judgments of a state tribunal depends on the twenty-fifth section of the judicial act. That section enacts "that a final judgment or decree in any suit in the highest court of law or equity of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under," "any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of such, their validity" "may be re-examined and reversed or affirmed in the supreme court of the United States."

In this case the city ordinance of Charleston is the exercise

of an "authority under the state of South Carolina," "the validity of which has been drawn in question on the ground of its being repugnant to the constitution," and "the decision is in favor of its validity." The question, therefore, which was decided by the constitutional court, is the very question on which the revising power of this tribunal is to be exercised, and the only inquiry is, whether it has been decided in a case described in the section which authorizes the writ of error that has been awarded. Is a writ of prohibition a suit?

The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit. The question between the parties is precisely the same as it would have been in a writ of replevin, or in an action of trespass. The constitutionality of the ordinance is contested; the party aggrieved by it applies to a court; and at his suggestion, a writ of prohibition, the appropriate remedy, is issued. The opposite party appeals; and, in the highest court, the judgment is reversed and judgment given for the defendant. This judgment was, we think, rendered in a suit.

We think also that it was a final judgment, in the sense in which that term is used in the twenty-fifth section of the judicial act. If it were applicable to those judgments and decrees only in which the right was finally decided, and could never again be litigated between the parties, the provisions of the section would be confined within much narrower limits than the words import, or than congress could have intended. Judgments in actions of ejectment, and decrees in chancery dismissing a bill without prejudice, however deeply they might affect rights protected by the constitution, laws, or treaties of the United States, would not be subject to the revision of this court. A prohibition might issue, restraining a collector from collecting duties, and this court would not revise and correct

2 Pet. 464.

the judgment. The word "final" must be understood in the section under consideration as applying to all judgments and decrees which determine the particular cause.

We think, then, that the writ of error has brought the cause properly before this court.

This brings us to the main question. Is the stock issued for loans made to the government of the United States liable to be taxed by states and corporations?

Congress has power "to borrow money on the credit of the United States." The stock it issues is the evidence of a debt created by the exercise of this power. The tax in question is a tax upon the contract subsisting between the government and the individual. It bears directly upon that contract, while subsisting and in full force. The power operates upon the contract the instant it is framed, and must imply a right to affect that contract.

If the states and corporations throughout the union possess the power to tax a contract for the loan of money, what shall arrest this principle in its application to every other contract? What measure can government adopt which will not be exposed to its influence?

But it is unnecessary to pursue this principle through its diversified application to all the contracts, and to the various operations of government. No one can be selected which is of more vital interest to the community than this of borrowing money on the credit of the United States. No power has been conferred by the American people on their government, the free and unburdened exercise of which more deeply affects every member of our republic. In war, when the honor, the safety, the independence of the nation are to be defended, when all its resources are to be strained to the utmost, credit must be brought in aid of taxation, and the abundant revenue of peace and prosperity must be anticipated to supply the exigencies, the urgent demands of the moment. The people, for objects the most important which can occur in the progress of nations, have empowered their government to make these anticipations,

2 Pet. 465.

"to borrow money on the credit of the United States." Can anything be more dangerous, or more injurious, than the admission of a principle which authorizes every state and every corporation in the union, which possesses the right of taxation, to burden the exercise of this power at their discretion?

If the right to impose the tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent, within the jurisdiction of the state or corporation which imposes it, which the will of each state and corporation may prescribe. A power, which is given by the whole American people for their common good, which is to be exercised at the most critical periods for the most important purposes, on the free exercise of which the interests certainly, perhaps the liberty, of the whole may depend, may be burdened, impeded, if not arrested, by any of the organized parts of the confederacy.

In a society formed like ours, with one supreme government for national purposes, and numerous state governments for other purposes, in many respects independent, and in the uncontrolled exercise of many important powers, occasional interferences ought not to surprise us. The power of taxation is one of the most essential to a state, and one of the most extensive in its operation. The attempt to maintain a rule which shall limit its exercise is, undoubtedly, among the most delicate and difficult duties which can devolve on those whose province it is to expound the supreme law of the land in its application to the cases of individuals. This duty has more than once devolved on this court. In the performance of it we have considered it as a necessary consequence from the supremacy of the government of the whole, that its action, in the exercise of its legitimate powers, should be free and unembarrassed by any conflicting powers in the possession of its parts; that the powers of a state cannot rightfully be so exercised as to impede and obstruct the free course of those measures which the government of the states united may rightfully adopt.

This subject was brought before the court in the case of

2 Pet. 466.

M'Culloch v. The State of Maryland, (4 Wheaton, 316.) when it was thoroughly argued and deliberately considered. The question decided in that case bears a near resemblance to that which is involved in this. It was discussed at the bar in all its relations, and examined by the court with its utmost attention. We will not repeat the reasoning which conducted us to the conclusion thus formed; but that conclusion was that "all subjects over which the sovereign power of a state extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation." "The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission;" but not "to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States." "The attempt to use" the power of taxation "on the means employed by the government of the union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give."

The court said, in that case, that "the states have no power, by taxation, or otherwise, to retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by congress to carry into execution the powers vested in the general government."

We retain the opinions which were then expressed. A contract made by the government, in the exercise of its power, to borrow money on the credit of the United States, is, undoubtedly, independent of the will of any state in which the individual who lends may reside, and is, undoubtedly, an operation essential to the important objects for which the government was created. It ought, therefore, on the principles settled in the case of *M'Culloch v. The State of Maryland*, to be exempt from state taxation, and, consequently, from being taxed by corporations deriving their power from states.

It is admitted that the power of the government to borrow money cannot be directly opposed, and that any law directly

2 Pet. 467.

obstructing its operation would be void; but a distinction is taken between direct opposition and those measures which may consequentially affect it; that is, that a law prohibiting loans to the United States would be void, but a tax on them to any amount is allowable.

It is, we think, impossible not to perceive the intimate connexion which exists between these two modes of acting on the subject.

It is not the want of original power in an independent sovereign state. to prohibit loans to a foreign government, which restrains the legislature from direct opposition to those made by the United States. The restraint is imposed by our constitution. The American people have conferred the power of borrowing money on their government, and by making that government supreme, have shielded its action, in the exercise of this power, from the action of the local governments. The grant of the power is incompatible with a restraining or controlling power; and the declaration of supremacy is a declaration that no such restraining or controlling power shall be exercised.

The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely.

It is admitted by the counsel for the defendants, that the power to tax stock must affect the terms on which loans will be made; but this objection, it is said, has no more weight, when urged against the application of an acknowledged power to government stock, than if urged against its application to lands sold by the United States.

The distinction is, we think, apparent. When lands are sold, no connexion remains between the purchaser and the government. The lands purchased become a part of the mass

2 Pet. 468.

of property in the country, with no implied exemption from common burdens. All lands are derived from the general or particular government, and all lands are subject to taxation. Lands sold are in the condition of money borrowed and repaid. Its liability to taxation, in any form it may then assume, is not questioned. The connexion between the borrower and the lender is dissolved. It is no burden on loans, it is no impediment to the power of borrowing, that the money, when repaid, loses its exemption from taxation. But a tax upon debts due from the government stands, we think, on very different principles from a tax on lands which the government has sold.

"The Federalist" has been quoted in the argument, and an eloquent and well merited eulogy has been bestowed on the great statesman who is supposed to be the author of the number from which the quotation was made. This high authority was also relied upon in the case of *M'Culloch* v. *The State of Maryland*, and was considered by the court. Without repeating what was then said, we refer to it as exhibiting our view of the sentiments expressed on this subject by the authors of that work.

It has been supposed that a tax on stock comes within the exceptions stated in the case of *M'Culloch* v. *The State of Maryland*. We do not think so. The Bank of the United States is an instrument essential to the fiscal operations of the government, and the power which might be exercised to its destruction was denied. But property acquired by that corporation in a state was supposed to be placed in the same condition with property acquired by an individual.

The tax on government stock is thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and, consequently, to be repugnant to the constitution.

We are, therefore, of opinion that the judgment of the constitutional court of the state of South Carolina, reversing the order made by the court of common pleas, awarding a prohibition to the city council of Charleston, to restrain them from levy-

2 Pet. 469.

ing a tax imposed on six and seven per cent. stock of the United States, under an ordinance to raise supplies to the use of the city of Charleston, for the year 1823, is erroneous in this: that the said constitutional court adjudged that the said ordinance was not repugnant to the constitution of the United States; whereas, this court is of opinion that such repugnancy does exist. We are, therefore, of opinion that the said judgment ought to be reversed and annulled, and the cause remanded to the constitutional court for the state of South Carolina, that further proceedings may be had therein according to law.

2 Pet. 469.

CRAIG AND OTHERS *v.* THE STATE OF MISSOURI.

JANUARY TERM, 1830.

[4 Peters's Reports, 411–465.]

In 1821 the state of Missouri established loan offices, from which certificates issued bearing two per cent. interest, and receivable for debts due the state. Craig and others borrowed some of these certificates, and gave their note therefor. The note was not paid, and the state sued them. The state courts having decided against Craig, he sued out his writ of error to the United States supreme court, the opinion of which was given by the chief justice as follows:—

This is a writ of error to a judgment rendered in the court of last resort, in the state of Missouri, affirming a judgment obtained by the state in one of its inferior courts against Hiram Craig and others, on a promissory note.

The judgment is in these words: "And afterwards, at a court," &c., "the parties came into court by their attorneys, and, neither party desiring a jury, the cause is submitted to the court; therefore, all and singular the matters and things being seen and heard by the court, it is found by them that the said defendants did assume upon themselves, in manner and form as the plaintiff by her counsel alleged. And the court also find that the consideration, for which the writing declared upon and the assumpsit was made, was for the loan of loan-office certificates, loaned by the state at her loan office at Chariton; which certificates were issued, and the loan made, in the manner pointed out by an act of the legislature of the said state of Missouri, approved the twenty-seventh day of June, 1821, entitled "An Act for the Establishment of Loan Offices," and the acts amendatory and supplementary thereto; and the court do

further find that the plaintiff has sustained damages by reason of the non-performance of the assumptions and undertakings of them, the said defendants, to the sum of two hundred and thirty-seven dollars and seventy-nine cents, and do assess her damages to that sum. Therefore, it is considered," &c.

The first inquiry is into the jurisdiction of the court.

The twenty-fifth section of the judicial act declares "that a final judgment or decree, in any suit in the highest court of law or equity of a state, in which a decision in the suit could be had, where is drawn in question" "the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision in favor of such, their validity" "may be re-examined, and reversed or affirmed in the supreme court of the United States."

To give jurisdiction to this court, it must appear in the record, 1. That the validity of a statute of the state of Missouri was drawn in question, on the ground of its being repugnant to the constitution of the United States; 2. That the decision was in favor of its validity.

1. To determine whether the validity of a statute of the state was drawn in question, it will be proper to inspect the pleadings in the cause, as well as the judgment of the court.

The declaration is on a promissory note, dated on the first day of August, 1822, promising to pay to the state of Missouri, on the first day of November, 1822, at the loan office in Chariton, the sum of one hundred and ninety-nine dollars, ninety-nine cents, and the two per cent. per annum, the interest accruing on the certificates borrowed, from the first of October, 1821. This note is obviously given for certificates loaned under the "Act for the Establishment of Loan Offices." That act directs that loans on personal securities shall be made of sums less than two hundred dollars. This note is for one hundred and ninety-nine dollars, ninety-nine cents. The act directs that the certificates issued by the state shall carry two per cent. interest from the date, which interest shall be calculated

4 Pet. 426.

on the amount of the loan. The note promises to repay the sum, with the two per cent. interest, accruing on the certificates borrowed, from the first day of October, 1821. It cannot be doubted that the declaration is on a note given in pursuance of the act which has been mentioned.

Neither can it be doubted. that the plea of non-assumpsit allowed the defendants to draw into question, at the trial, the validity of the consideration on which the note was given. Everything which disaffirms the contract, everything which shows it to be void, may be given in evidence on the general issue in an action of assumpsit. The defendants, therefore, were at liberty to question the validity of the consideration which was the foundation of the contract, and the constitutionality of the law in which it originated.

Have they done so?

Had the cause been tried before a jury, the regular course would have been to move the court to instruct the jury that the act of assembly, in pursuance of which the note was given, was repugnant to the constitution of the United States, and to except to the charge of the judges, if in favor of its validity; or a special verdict might have been found by the jury, stating the act of assembly, the execution of the note in payment of certificates loaned in pursuance of that act, and referring its validity to the court. The one course or the other would have shown that the validity of the act of assembly was drawn into question, on the ground of its repugnancy to the constitution; and that the decision of the court was in favor of its validity. But the one course or the other would have required both a court and jury. Neither could be pursued where the office of the jury was performed by the court. In such a case, the obvious substitute for an instruction to the jury, or a special verdict, is a statement by the court of the points in controversy on which its judgment is founded. This may not be the usual mode of proceeding, but it is an obvious mode; and if the court of the state has adopted it, this court cannot give up substance for form.

4 Pet. 426.

The arguments of counsel cannot be spread on the record. The points urged in argument cannot appear. But the motives stated by the court on the record for its judgment, and which form a part of the judgment itself, must be considered as exhibiting the points to which those arguments were directed, and the judgment as showing the decision of the court upon those points. There was no jury to find the facts and refer the law to the court; but if the court which was substituted for the jury has found the facts on which its judgment was rendered, its finding must be equivalent to the finding of a jury. Has the court, then, substituting itself for a jury, placed facts upon the record, which, connected with the pleadings, show that the act in pursuance of which this note was executed was drawn into question, on the ground of its repugnancy to the constitution?

After finding that the defendants did assume upon themselves, &c., the court proceeds to find "that the consideration, for which the writing declared upon and the assumpsit was made, was the loan of loan-office certificates loaned by the state at her loan office at Chariton; which certificates were issued, and the loan made, in the manner pointed out by an act of the legislature of the said state of Missouri, approved the 27th of June, 1821, entitled," &c.

Why did not the court stop immediately after the usual finding that the defendants assumed upon themselves? Why proceed to find that the note was given for loan-office certificates issued under the act contended to be unconstitutional, and loaned in pursuance of that act, if the matter thus found was irrelevant to the question they were to decide?

Suppose the statement made by the court to be contained in the verdict of a jury which concludes with referring to the court the validity of the note thus taken in pursuance of the act; would not such a verdict bring the constitutionality of the act, as well as its construction, directly before the court? We think it would; such a verdict would find that the consideration of the note was loan-office certificates, issued and loaned in the

4 Pet. 427.

manner prescribed by the act. What could be referred to the court by such a verdict, but the obligation of the law? It finds that the certificates for which the note was given were issued in pursuance of the act, and that the contract was made in conformity with it. Admit the obligation of the act, and the verdict is for the plaintiff; deny its obligation, and the verdict is for the defendant. On what ground can its obligation be contested, but its repugnancy to the constitution of the United States? No other is suggested. At any rate it is open to that objection. If it be, in truth, repugnant to the constitution of the United States, that repugnancy might have been urged in the state, and may, consequently, be urged in this court; since it is presented by the facts in the record, which were found by the court that tried the cause.

It is impossible to doubt, that, in point of fact, the constitutionality of the act, under which the certificates were issued that formed the consideration of this note, constituted the only real question made by the parties, and the only real question decided by the court. But the record is to be inspected with judicial eyes; and as it does not state in express terms that this point was made, it has been contended that this court cannot assume the fact that it was made or determined in the tribunal of the state.

The record shows distinctly that this point existed, and that no other did exist; the special statement of facts made by the court, as exhibiting the foundation of its judgment, contains this point and no other. The record shows clearly that the cause did depend, and must depend, on this point alone. If in such a case the mere omission of the court of Missouri to say, in terms, that the act of the legislature was constitutional, withdraws that point from the cause, or must close the judicial eyes of the appellate tribunal upon it; nothing can be more obvious than that the provisions of the constitution, and of an act of congress, may be always evaded; and may be often, as we think they would be in this case, unintentionally defeated.

But this question has frequently occurred; and has, we think,

been frequently decided in this court. *Smith* v. *The State of Maryland*, (6 Cranch, 286,) *Martin* v. *Hunter's Lessee*, (1 Wheaton, 355,) *Miller* v. *Nicholls*, (4 Wheaton, 311,) *Williams* v. *Norris*, (12 Wheaton, 117,) *Wilson et al.* v. *The Black Bird Creek Marsh Company*, (2 Peters, 245,) and *Harris* v. *Dennie*, in this term, are all, we think, expressly in point. There has been perfect uniformity in the construction given by this court to the twenty-fifth section of the judicial act. That construction is, that it is not necessary to state, in terms, on the record, that the constitution, or a treaty, or law of the United States has been drawn in question, or the validity of a state law, on the ground of its repugnancy to the constitution. It is sufficient if the record shows that the constitution, or a treaty, or law of the United States must have been construed, or that the constitutionality of a state law must have been questioned; and the decision has been in favor of the party claiming under such law.

We think, then, that the facts stated on the record presented the question of repugnancy between the constitution of the United States and the act of Missouri to the court for its decision. If it was presented, we are to inquire,—

2. Was the decision of the court in favor of its validity?

The judgment in favor of the plaintiff is a decision in favor of the validity of the contract, and, consequently, of the validity of the law by the authority of which the contract was made.

The case is, we think, within the twenty-fifth section of the judicial act, and, consequently, within the jurisdiction of this court.

This brings us to the great question in the cause: Is the act of the legislature of Missouri repugnant to the constitution of the United States?

The counsel for the plaintiffs in error maintain that it is repugnant to the constitution, because its object is the emission of bills of credit contrary to the express prohibition contained in the tenth section of the first article.

The act, under the authority of which the certificates loaned to the plaintiffs in error were issued, was passed on the 26th of

4 Pet. 429.

June, 1821, and is entitled "An Act for the Establishment of Loan Offices." The provisions that are material to the present inquiry are comprehended in the third, thirteenth, fifteenth, sixteenth, twenty-third, and twenty-fourth sections of the act, which are in these words :—

Section the third enacts, "That the auditor of public accounts and treasurer, under the direction of the governor, shall, and they are hereby required to, issue certificates, signed by the said auditor and treasurer, to the amount of two hundred thousand dollars, of denominations not exceeding ten dollars, nor less than fifty cents, (to bear such devices as they may deem the most safe,) in the following form, to wit: 'This certificate shall be receivable at the treasury, or any of the loan offices, of the state of Missouri, in the discharge of taxes or debts due to the state, for the sum of $———, with interest for the same, at the rate of two per cent. per annum from this date, the ——— day of ———, 182 .'"

The thirteenth section declares, "That the certificates of the said loan office shall be receivable at the treasury of the state, and by all tax-gatherers and other public officers, in payment of taxes or other moneys now due to the state or to any county or town therein, and the said certificates shall also be received by all officers civil and military in the state, in the discharge of salaries and fees of office."

The fifteenth section provides, "That the commissioners of the said loan offices shall have power to make loans of the said certificates to citizens of this state, residing within their respective districts only, and in each district a proportion shall be loaned to the citizens of each county therein, according to the number thereof," &c.

Section sixteenth, "That the said commissioners of each of the said offices are further authorized to make loans on personal securities by them deemed good and sufficient, for sums less than two hundred dollars; which securities shall be jointly and severally bound for the payment of the amount so loaned, with interest thereon," &c.

Section twenty-third, "That the general assembly shall, as soon as may be, cause the salt springs and lands attached thereto, given by congress to this state, to be leased out, and it shall always be the fundamental condition in such leases, that the lessee or lessees shall receive the certificates hereby required to be issued, in payment for salt, at a price not exceeding that which may be prescribed by law; and all the proceeds of the said salt springs, the interest accruing to the state, and all estates purchased by officers of the said several offices, under the provisions of this act, and all the debts now due or hereafter to be due to this state, are hereby pledged and constituted a fund for the redemption of the certificates hereby required to be issued, and the faith of the state is hereby also pledged for the same purpose."

Section twenty-fourth, "That it shall be the duty of the said auditor and treasurer to withdraw annually from circulation one-tenth part of the certificates which are hereby required to be issued," &c.

The clause in the constitution which this act is supposed to violate is in these words: "No state shall" "emit bills of credit."

What is a bill of credit? What did the constitution mean to forbid?

In its enlarged, and, perhaps, its literal sense, the term "bill of credit" may comprehend any instrument by which a state engages to pay money at a future day; thus including a certificate given for money borrowed. But the language of the constitution itself, and the mischief to be prevented, which we know from the history of our country, equally limit the interpretation of the terms. The word "emit" is never employed in describing those contracts by which a state binds itself to pay money at a future day for services actually received, or for money borrowed for present use; nor are instruments executed for such purposes, in common language, denominated "bills of credit." To "emit bills of credit" conveys to the mind the idea of issuing paper intended to circulate through the community,

4 Pet. 431.

for its ordinary purposes, as money, which paper is redeemable at a future day. This is the sense in which the terms have been always understood.

At a very early period of our colonial history the attempt to supply the want of the precious metals by a paper medium was made to a considerable extent; and the bills emitted for this purpose have been frequently denominated "bills of credit." During the war of our revolution we were driven to this expedient; and necessity compelled us to use it to a most fearful extent. The term has acquired an appropriate meaning; and "bills of credit" signify a paper medium, intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society. Such a medium has been always liable to considerable fluctuation. Its value is continually changing; and these changes, often great and sudden, expose individuals to immense loss, are the sources of ruinous speculations, and destroy all confidence between man and man. To cut up this mischief by the roots, a mischief which was felt through the United States, and which deeply affected the interest and prosperity of all, the people declared, in their constitution, that no state should emit bills of credit. If the prohibition means anything, if the words are not empty sounds, it must comprehend the emission of any paper medium, by a state government, for the purpose of common circulation.

What is the character of the certificates issued by authority of the act under consideration? What office are they to perform? Certificates, signed by the auditor and treasurer of the state, are to be issued by those officers, to the amount of two hundred thousand dollars, of denominations not exceeding ten dollars, nor less than fifty cents. The paper purports on its face to be receivable at the treasury, or at any loan office of the state of Missouri, in discharge of taxes or debts due to the state.

The law makes them receivable in discharge of all taxes, or debts due to the state, or any county or town therein; and of all salaries and fees of office to all officers civil and military within

4 Pet. 432.

the state, and for salt sold by the lessees of the public salt works. It also pledges the faith and funds of the state for their redemption.

It seems impossible to doubt the intention of the legislature in passing this act, or to mistake the character of these certificates, or the office they were to perform. The denominations of the bills, from ten dollars to fifty cents, fitted them for the purpose of ordinary circulation; and their reception in payment of taxes, and debts to the government and to corporations, and of salaries and fees, would give them currency. They were to be put into circulation, that is, emitted, by the government. In addition to all these evidences of an intention to make these certificates the ordinary circulating medium of the country, the law speaks of them in this character; and directs the auditor and treasurer to withdraw annually one-tenth of them from circulation. Had they been termed "bills of credit," instead of "certificates," nothing would have been wanting to bring them within the prohibitory words of the constitution.

And can this make any real difference? Is the proposition to be maintained, that the constitution meant to prohibit names and not things? That a very important act, big with great and ruinous mischief, which is expressly forbidden by words most appropriate for its description, may be performed by the substitution of a name? That the constitution, in one of its most important provisions, may be openly evaded by giving a new name to an old thing? We cannot think so. We think the certificates emitted under the authority of this act are as entirely bills of credit as if they had been so denominated in the act itself.

But it is contended, that, though these certificates should be deemed bills of credit according to the common acceptation of the term, they are not so in the sense of the constitution; because they are not made a legal tender.

The constitution itself furnishes no countenance to this distinction. The prohibition is general. It extends to all bills of credit, not to bills of a particular description. That tribunal

4 Pet. 433.

must be bold indeed, which, without the aid of other explanatory words, could venture on this construction. It is the less admissible in this case because the same clause of the constitution contains a substantive prohibition to the enactment of tender laws. The constitution, therefore, considers the emission of bills of credit, and the enactment of tender laws, as distinct operations, independent of each other, which may be separately performed. Both are forbidden. To sustain the one, because it is not also the other; to say that bills of credit may be emitted, if they be not made a tender in payment of debts, is, in effect, to expunge that distinct, independent prohibition, and to read the clause as if it had been entirely omitted. We are not at liberty to do this.

The history of paper money has been referred to, for the purpose of showing that its great mischief consists in being made a tender; and that, therefore, the general words of the constitution may be restrained to a particular intent.

Was it even true that the evils of paper money resulted solely from the quality of its being made a tender, this court would not feel itself authorized to disregard the plain meaning of words, in search of a conjectural intent to which we are not conducted by the language of any part of the instrument. But we do not think that the history of our country proves, either that being made a tender in payment of debts is an essential quality of bills of credit, or the only mischief resulting from them. It may, indeed, be the most pernicious; but that will not authorize a court to convert a general into a particular prohibition.

We learn from Hutchinson's History of Massachusetts, vol. I., p. 402, that bills of credit were emitted for the first time in that colony in 1690. An army returning unexpectedly from an expedition against Canada, which had proved as disastrous as the plan was magnificent, found the government totally unprepared to meet their claims. Bills of credit were resorted to, for relief from this embarrassment. They do not appear to have been made a tender; but they were not on that account the less bills of credit, nor were they absolutely harmless. The emission,

4 Pet. 434.

however, not being considerable, and the bills being soon redeemed, the experiment would have been productive of not much mischief, had it not been followed by repeated emissions to a much larger amount. The subsequent history of Massachusetts abounds with proofs of the evils with which paper money is fraught, whether it be or be not a legal tender.

Paper money was also issued in other colonies, both in the north and south; and whether made a tender or not, was productive of evils in proportion to the quantity emitted. In the war which commenced in America in 1755, Virginia issued paper money at several successive sessions, under the appellation of treasury notes. This was made a tender. Emissions were afterwards made in 1769, in 1771, and in 1773. These were not made a tender; but they circulated together; were equally bills of credit; and were productive of the same effects. In 1775 a considerable emission was made for the purposes of the war. The bills were declared to be current, but were not made a tender. In 1776 an additional emission was made, and the bills were declared to be a tender. The bills of 1775 and 1776 circulated together, were equally bills of credit, and were productive of the same consequences.

Congress emitted bills of credit to a large amount; and did not, perhaps could not, make them a legal tender. This power resided in the states. In May, 1777, the legislature of Virginia passed an act, for the first time, making the bills of credit issued under the authority of congress a tender, so far as to extinguish interest. It was not until March, 1781, that Virginia passed an act making all the bills of credit which had been emitted by congress, and all which had been emitted by the state, a legal tender in payment of debts. Yet they were, in every sense of the word, bills of credit previous to that time, and were productive of all the consequences of paper money. We cannot, then, assent to the proposition, that the history of our country furnishes any just argument in favor of that restricted construction of the constitution for which the counsel for the defendant in error contends.

4 Pet. 435.

The certificates for which this note was given being in truth "bills of credit" in the sense of the constitution, we are brought to the inquiry,—

Is the note valid of which they form the consideration?

It has been long settled that a promise made in consideration of an act which is forbidden by law is void. It will not be questioned that an act forbidden by the constitution of the United States, which is the supreme law, is against law. Now the constitution forbids a state to "emit bills of credit." The loan of these certificates is the very act which is forbidden. It is not the making of them, while they lie in the loan offices, but the issuing of them, the putting them into circulation, which is the act of emission; the act that is forbidden by the constitution. The consideration of this note is the emission of bills of credit by the state. The very act which constitutes the consideration is the act of emitting bills of credit, in the mode prescribed by the law of Missouri; which act is prohibited by the constitution of the United States.

Cases which we cannot distinguish from this in principle have been decided in state courts of great respectability, and in this court. In the case of *The Springfield Bank* v. *Merrick et al.* (14 Mass. Reports, 322) a note was made payable in certain bills, the loaning or negotiating of which was prohibited by statute, inflicting a penalty for its violation. The note was held to be void. Had this note been made in consideration of these bills, instead of being made payable in them, it would not have been less repugnant to the statute; and would, consequently, have been equally void.

In *Hunt* v. *Knickerbocker*, (5 Johnson's Reports, 327,) it was decided that an agreement for the sale of tickets in a lottery not authorized by the legislature of the state, although instituted under the authority of the government of another state, is contrary to the spirit and policy of the law, and void. The consideration on which the agreement was founded being illegal, the agreement was void. The books, both of Massachusetts and New York, abound with cases to the same effect. They turn upon

the question, whether the particular case is within the principle, not on the principle itself. It has never been doubted that a note given on a consideration which is prohibited by law is void. Had the issuing or circulation of certificates of this or of any other description been prohibited by a statute of Missouri, could a suit have been sustained in the courts of that state on a note given in consideration of the prohibited certificates? If it could not, are the prohibitions of the constitution to be held less sacred than those of a state law?

It had been determined, independently of the acts of congress on that subject, that sailing under the license of an enemy is illegal. *Patton* v. *Nicholson* (3 Wheaton's Reports, 204) was a suit brought in one of the courts of this district on a note given by Nicholson to Patton, both citizens of the United States, for a British license. The United States were then at war with Great Britain; but the license was procured without any intercourse with the enemy. The judgment of the circuit court was in favor of the defendant; and the plaintiff sued out a writ of error. The counsel for the defendant in error was stopped, the court declaring that the use of a license from the enemy being unlawful, one citizen had no right to purchase from or sell to another such a license, to be used on board an American vessel. The consideration for which the note was given being unlawful, it followed, of course, that the note was void.

A majority of the court feels constrained to say that the consideration on which the note in this case was given is against the highest law of the land, and that the note itself is utterly void. In rendering judgment for the plaintiff, the court for the state of Missouri decided in favor of the validity of a law which is repugnant to the constitution of the United States.

In the argument, we have been reminded by one side of the dignity of a sovereign state, of the humiliation of her submitting herself to this tribunal, of the dangers which may result from inflicting a wound on that dignity; by the other, of the still superior dignity of the people of the United States, who have spoken their will in terms which we cannot misunderstand.

4 Pet. 437.

To these admonitions we can only answer, that, if the exercise of that jurisdiction which has been imposed upon us by the constitution and laws of the United States shall be calculated to bring on those dangers which have been indicated; or if it shall be indispensable to the preservation of the union, and, consequently, of the independence and liberty of these states; these are considerations which address themselves to those departments which may with perfect propriety be influenced by them. This department can listen only to the mandates of law; and can tread only that path which is marked out by duty.

The judgment of the supreme court of the state of Missouri for the first judicial district is reversed; and the cause remanded, with directions to enter judgment for the defendants.

4 Pet. 438.

PROVIDENCE BANK v. BILLINGS AND PITTMAN.

JANUARY TERM, 1830.

[4 Peters's Reports, 514–565.]

The facts of this case are so fully stated in the following opinion of the court as delivered by the chief justice, that no abstract is needed :—

This is a writ of error to a judgment rendered in the highest court for the state of Rhode Island, in an action of trespass brought by the plaintiff in error against the defendant.

In November, 1791, the legislature of Rhode Island granted a charter of incorporation to certain individuals who had associated themselves together for the purpose of forming a banking company. They are incorporated by the name of the "President, Directors, and Company of the Providence Bank;" and have the ordinary powers which are supposed to be necessary for the usual objects of such associations.

In 1822 the legislature of Rhode Island passed "An Act imposing a Duty on Licensed Persons and others, and Bodies Corporate within the State;" in which, among others things, it is enacted "that there shall be paid, for the use of the state, by each and every bank within the state, except the Bank of the United States, the sum of fifty cents on each and every thousand dollars of the capital stock actually paid in." This tax was afterwards augmented to one dollar and twenty-five cents.

The Providence Bank, having determined to resist the payment of this tax, brought an action of trespass against the officers by whom a warrant of distress was issued against and served upon the property of the bank in pursuance of the law. The defendants justify the taking, set out in the declaration, under the act of assembly imposing the tax; to which plea the

plaintiffs demur, and assign, for cause of demurrer, that the act is repugnant to the constitution of the United States, inasmuch as it impairs the obligation of the contract created by their charter of incorporation. Judgment was given by the court of common pleas in favor of the defendants; which judgment was, on appeal, confirmed by the supreme judicial court of the state. That judgment has been brought before this court by a writ of error.

It has been settled that a contract entered into between a state and an individual is as fully protected by the tenth section of the first article of the constitution as a contract between two individuals; and it is not denied that a charter incorporating a bank is a contract. Is this contract impaired by taxing the banks of the state?

This question is to be answered by the charter itself.

It contains no stipulation promising exemption from taxation. The state, then, has made no express contract which has been impaired by the act of which the plaintiffs complain. No words have been found in the charter, which, in themselves, would justify the opinion that the power of taxation was in the view of either of the parties; and that an exemption of it was intended, though not expressed. The plaintiffs find great difficulty in showing that the charter contains a promise, either express or implied, not to tax the bank. The elaborate and ingenious argument which has been urged amounts, in substance, to this: The charter authorizes the bank to employ its capital in banking transactions, for the benefit of the stockholders. It binds the state to permit these transactions for this object. Any law arresting directly the operations of the bank would violate this obligation, and would come within the prohibition of the constitution. But, as that cannot be done circuitously which may not be done directly, the charter restrains the state from passing any act which may indirectly destroy the profits of the bank. A power to tax the bank may, unquestionably, be carried to such an excess as to take all its profits, and still more than its profits, for the use of the state; and, consequently, destroy the institu-

tion. Now, whatever may be the rule of expediency, the constitutionality of a measure depends not on the degree of its exercise, but on its principle. A power, therefore, which may, in effect, destroy the charter, is inconsistent with it, and is impliedly renounced by granting it. Such a power cannot be exercised without impairing the obligation of the contract. When pushed to its extreme point, or exercised in moderation, it is the same power, and is hostile to the rights granted by the charter. This is substantially the argument for the bank. The plaintiffs cite and rely on several sentiments expressed on various occasions by this court, in support of these positions.

The claim of the Providence Bank is certainly of the first impression. The power of taxing moneyed corporations has been frequently exercised; and has never before, so far as is known, been resisted. Its novelty, however, furnishes no conclusive argument against it.

That the taxing power is of vital importance, that it is essential to the existence of government, are truths which it cannot be necessary to re-affirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a state may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist; but, as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the state to abandon it does not appear.

The plaintiffs would give to this charter the same construction as if it contained a clause exempting the bank from taxation on its stock in trade. But can it be supposed that such a clause would not enlarge its privileges? They contend that it must be implied; because the power to tax may be so wielded as to defeat the purpose for which the charter was granted. And may not this be said with equal truth of other legislative powers? Does it not also apply with equal force to every incorporated company? A company may be incorporated for the purpose of

4 Pet. 561.

trading in goods as well as trading in money. If the policy of the state should lead to the imposition of a tax on unincorporated companies, could those which might be incorporated claim an exemption, in virtue of a charter which does not indicate such an intention? The time may come when a duty may be imposed on manufactures. Would an incorporated company be exempted from this duty, as the mere consequence of its charter?

The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men. This capacity is always given to such a body. Any privileges which may exempt it from the burdens common to individuals do not flow necessarily from the charter, but must be expressed in it, or they do not exist.

If the power of taxation is inconsistent with the charter, because it may be so exercised as to destroy the object for which the charter is given, it is equally inconsistent with every other charter, because it is equally capable of working the destruction of the objects for which every other charter is given. If the grant of a power to trade in money to a given amount implies an exemption of the stock in trade from taxation, because the tax may absorb all the profits, then the grant of any other thing implies the same exemption; for that thing may be taxed to an extent which will render it totally unprofitable to the grantee. Land, for example, has, in many, perhaps in all the states, been granted by government since the adoption of the constitution. This grant is a contract, the object of which is that the profits issuing from it shall inure to the benefit of the grantee. Yet the power of taxation may be carried so far as to absorb these profits. Does this impair the obligation of the contract? The idea is rejected by all; and the proposition appears so extravagant that it is difficult to admit any resemblance in the cases. And yet, if the proposition for which the plaintiffs contend be true, it carries us to this point. That proposition is, that a power which is in itself capable of being exerted to the total destruction of the grant, is inconsistent with the grant; and is, therefore, impliedly relinquished by the grantor, though the

4 Pet. 562.

language of the instrument contains no allusion to the subject. If this be an abstract truth, it may be supposed universal. But it is not universal; and therefore its truth cannot be admitted, in these broad terms, in any case. We must look for the exemption in the language of the instrument; and if we do not find it there, it would be going very far to insert it by construction.

The power of legislation, and, consequently, of taxation, operates on all the persons and property belonging to the body politic. This is an original principle, which has its foundation in society itself. It is granted by all, for the benefit of all. It resides in government as a part of itself, and need not be reserved, when property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies. However absolute the right of an individual may be, it is still in the nature of that right, that it must bear a portion of the public burdens; and that portion must be determined by the legislature. This vital power may be abused; but the constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the state governments. The interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security, where there is no express contract, against unjust and excessive taxation, as well as against unwise legislation generally. This principle was laid down in the case of *M'Culloch* v. *The State of Maryland*, and in *Osborn et al.* v. *The Bank of the United States*. Both those cases, we think, proceeded on the admission that an incorporated bank, unless its charter shall express the exemption, is no more exempted from taxation than an unincorporated company would be, carrying on the same business.

The case of *Fletcher* v. *Peck* has been cited; but in that case the legislature of Georgia passed an act to annul its grant. The case of the *State of New Jersey* v. *Wilson* has been also mentioned; but in that case the stipulation exempting the land from taxation was made in express words.

The reasoning of the court in the case of *M'Culloch* v. *The*

4 Pet. 563.

State of Maryland has been applied to this case; but the court itself appears to have provided against this application. Its opinion in that case, as well as in *Osborn et al.* v. *The Bank of the United States*, was founded expressly on the supremacy of the laws of congress, and the necessary consequence of that supremacy to exempt its instruments, employed in the execution of its powers, from the operation of any interfering power whatever. In reasoning on the argument, that the power of taxation was not confined to the people and property of a state, but might be exercised on every object brought within its jurisdiction, this court admitted the truth of the proposition; and added, that "the power was an incident of sovereignty, and was co-extensive with that to which it was an incident. All subjects," the court said, "over which the sovereign power of a state extends, are objects of taxation." "The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States? We think not."

So in the case of *Osborn* v. *The Bank of the United States*, the court said, "the argument" in favor of the right of the state to tax the bank "supposes the corporation to have been originated for the management of an individual concern, to be founded upon contract between individuals, having private trade and private profit for its great end and principal object.

"If these premises were true, the conclusion drawn from them would be inevitable. This mere private corporation, engaged in its own business, would certainly be subject to the taxing power of the state as any individual would be."

The court was certainly not discussing the question, whether a tax imposed by a state on a bank chartered by itself impaired the obligation of its contract; and these opinions are not conclusive as they would be had they been delivered in such a case; but they show that the question was not considered as doubtful, and that inferences, drawn from general expressions pointed to a different subject, cannot be correctly drawn.

4 Pet. 564.

We have reflected seriously on this case, and are of opinion that the act of the legislature of Rhode Island, passed in 1822, imposing a duty on licensed persons and others, and bodies corporate within the state, does not impair the obligation of the contract created by the charter granted to the plaintiffs in error. It is, therefore, the opinion of this court that there is no error in the judgment of the supreme judicial court for the state of Rhode Island, affirming the judgment of the court of common pleas in this case; and the same is affirmed; and the cause is remanded to the said supreme judicial court, that its judgment may be finally entered.

4 Pet. 565.

THE CHEROKEE NATION *v.* THE STATE OF GEORGIA.

JANUARY TERM, 1831.

[5 Peters's Reports, 1–80.]

So far as the opinion of the court is concerned, it would be useless to state the facts of this case more fully than is done in that opinion, as it was given by Chief Justice Marshall as follows :—

This bill is brought by the Cherokee nation, praying an injunction to restrain the state of Georgia from the execution of certain laws of that state, which, as is alleged, go directly to annihilate the Cherokees as a political society, and to seize, for the use of Georgia, the lands of the nation, which have been assured to them by the United States in solemn treaties repeatedly made and still in force.

If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts, and our arms, have yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence. To preserve this remnant the present application is made.

Before we can look into the merits of the case a preliminary inquiry presents itself : Has this court jurisdiction of the cause ?

The third article of the constitution describes the extent of the judicial power. The second section closes an enumeration of the cases to which it is extended, with "controversies" "between a state, or the citizens thereof, and foreign states, citizens,

or subjects." A subsequent clause of the same section gives the supreme court original jurisdiction in all cases in which a state shall be a party. The party defendant may, then, unquestionably, be sued in this court. May the plaintiff sue in it? Is the Cherokee nation a foreign state in the sense in which that term is used in the constitution?

The counsel for the plaintiffs have maintained the affirmative of this proposition with great earnestness and ability. So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of the majority of the judges, been completely successful. They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.

A question of much more difficulty remains: Do the Cherokees constitute a foreign state in the sense of the constitution?

The counsel have shown conclusively that they are not a state of the union, and have insisted, that, individually, they are aliens, not owing allegiance to the United States. An aggregate of aliens composing a state must, they say, be a foreign state. Each individual being foreign, the whole must be foreign.

This argument is imposing, but we must examine it more closely before we yield to it. The condition of the Indians in relation to the United States is, perhaps, unlike that of any other two people in existence. In the general, nations not owing a common allegiance are foreign to each other. The term "foreign nation" is, with strict propriety, applicable by either to the other. But the relation of the Indians to the United States is

marked by peculiar and cardinal distinctions which exist nowhere else.

The Indian territory is admitted to compose a part of the United States. In all our maps, geographical treatises, histories, and laws, it is so considered. In all our intercourse with foreign nations, in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our own citizens. They acknowledge themselves in their treaties to be under the protection of the United States; they admit that the United States shall have the sole and exclusive right of regulating the trade with them, and managing all their affairs as they think proper; and the Cherokees, in particular, were allowed by the treaty of Hopewell, which preceded the constitution, "to send a deputy of their choice, whenever they think fit, to congress." Treaties were made with some tribes by the state of New York, under a then unsettled construction of the confederation, by which they ceded all their lands to that state, taking back a limited grant to themselves, in which they admit their dependence.

Though the Indians are acknowledged to have an unquestionable, and heretofore unquestioned, right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants;

5 Pet. 17.

and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility.

These considerations go far to support the opinion that the framers of our constitution had not the Indian tribes in view, when they opened the courts of the union to controversies between a state or the citizens thereof, and foreign states.

In considering this subject, the habits and usages of the Indians, in their intercourse with their white neighbors, ought not to be entirely disregarded. At the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had, perhaps, never entered the mind of an Indian or of his tribe. Their appeal was to the tomahawk, or to the government. This was well understood by the statesmen who framed the constitution of the United States, and might furnish some reason for omitting to enumerate them among the parties who might sue in the courts of the union. Be this as it may, the peculiar relations between the United States and the Indians occupying our territory are such that we should feel much difficulty in considering them as designated by the term "foreign state," were there no other part in the constitution which might shed light on the meaning of these words. But we think, that, in construing them, considerable aid is furnished by that clause, in the eighth section of the third article, which empowers congress to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

In this clause they are as clearly contradistinguished by a name appropriate to themselves, from foreign nations, as from the several states composing the union. They are designated by a distinct appellation; and as this appellation can be applied to neither of the others, neither can the appellation distinguish-

5 Pet. 18.

ing either of the others be, in fair construction, applied to them. The objects, to which the power of regulating commerce might be directed, are divided into three distinct classes,—foreign nations, the several states, and Indian tribes. When forming this article, the convention considered them as entirely distinct. We cannot assume that the distinction was lost in framing a subsequent article, unless there be something in its language to authorize the assumption.

The counsel for the plaintiffs contend that the words "Indian tribes" were introduced into the article empowering congress to regulate commerce, for the purpose of removing those doubts in which the management of Indian affairs was involved by the language of the ninth article of the confederation. Intending to give the whole power of managing those affairs to the government about to be instituted, the convention conferred it explicitly; and omitted those qualifications which embarrassed the exercise of it as granted in the confederation. This may be admitted without weakening the construction which has been intimated. Had the Indian tribes been foreign nations in the view of the convention, this exclusive power of regulating intercourse with them might have been, and, most probably, would have been, specifically given, in language indicating that idea, not in language contradistinguishing them from foreign nations. Congress might have been empowered "to regulate commerce with foreign nations, including the Indian tribes, and among the several states." This language would have suggested itself to statesmen who considered the Indian tribes as foreign nations, and were yet desirous of mentioning them particularly.

It has been also said that the same words have not necessarily the same meaning attached to them when found in different parts of the same instrument: their meaning is controlled by the context. This is undoubtedly true. In common language the same word has various meanings, and the peculiar sense in which it is used in any sentence is to be determined by the context. This may not be equally true with respect to

proper names. "Foreign nations" is a general term, the application of which to Indian tribes, when used in the American constitution, is, at best, extremely questionable. In one article, in which a power is given to be exercised in regard to foreign nations generally, and to the Indian tribes particularly, they are mentioned as separate in terms clearly contradistinguishing them from each other. We perceive plainly that the constitution in this article does not comprehend Indian tribes in the general term "foreign nations," not, we presume, because a tribe may not be a nation, but because it is not foreign to the United States. When, afterwards, the term "foreign state" is introduced, we cannot impute to the convention the intention to desert its former meaning, and to comprehend Indian tribes within it, unless the context force that construction on us. We find nothing in the context, and nothing in the subject of the article, which leads to it.

The court has bestowed its best attention on this question, and, after mature deliberation, the majority is of opinion that an Indian tribe or nation within the United States is not a foreign state in the sense of the constitution, and cannot maintain an action in the courts of the United States.

A serious additional objection exists to the jurisdiction of the court. Is the matter of the bill the proper subject for judicial inquiry and decision? It seeks to restrain a state from the forcible exercise of legislative power over a neighboring people asserting their independence; their right to which the state denies. On several of the matters alleged in the bill, for example, on the laws making it criminal to exercise the usual powers of self-government in their own country by the Cherokee nation, this court cannot interpose; at least, in the form in which those matters are presented.

That part of the bill which respects the land occupied by the Indians, and prays the aid of the court to protect their possession, may be more doubtful. The mere question of right might, perhaps, be decided by this court in a proper case with proper parties. But the court is asked to do more than decide on the

5 Pet. 19.

title. The bill requires us to control the legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may be well questioned. It savors too much of the exercise of political power to be within the proper province of the judicial department. But the opinion on the point respecting parties makes it unnecessary to decide this question.

If it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future.

The motion for an injunction is denied.

5 Pet. 20.

WORCESTER v. THE STATE OF GEORGIA.

JANUARY TERM, 1832.

[6 Peters's Reports, 515–597.]

In this important case the chief justice, who delivered the opinion of the court, has given every fact and document necessary to a full comprehension of it, as follows:—

This cause, in every point of view in which it can be placed, is of the deepest interest.

The defendant is a state, a member of the union, which has exercised the powers of government over a people who deny its jurisdiction, and are under the protection of the United States.

The plaintiff is a citizen of the state of Vermont, condemned to hard labor for four years in the penitentiary of Georgia; under color of an act which he alleges to be repugnant to the constitution, laws, and treaties of the United States.

The legislative power of a state, the controlling power of the constitution and laws of the United States, the rights, if they have any, the political existence of a once numerous and powerful people, the personal liberty of a citizen, are all involved in the subject now to be considered.

It behoves this court, in every case, more especially in this, to examine into its jurisdiction with scrutinizing eyes, before it proceeds to the exercise of a power which is controverted.

The first step in the performance of this duty is the inquiry, whether the record is properly before the court.

It is certified by the clerk of the court which pronounced the judgment of condemnation under which the plaintiff in error is imprisoned; and is also authenticated by the seal of the court. It is returned with, and annexed to, a writ of error issued in regu-

lar form, the citation being signed by one of the associate justices of the supreme court, and served on the governor and attorney-general of the state, more than thirty days before the commencement of the term to which the writ of error was returnable.

The judicial act, (sections 22, 25, 2 Laws United States 64, 65,) so far as it prescribes the mode of proceeding, appears to have been literally pursued.

In February, 1797, a rule (6 Wheaton's Rules) was made on this subject, in the following words: "It is ordered by the court, that the clerk of the court, to which any writ of error shall be directed, may make return of the same by transmitting a true copy of the record, and of all proceedings in the same, under his hand and the seal of the court."

This has been done. But the signature of the judge has not been added to that of the clerk. The law does not require it. The rule does not require it.

In the case of *Martin* v. *Hunter's Lessee* (1 Wheaton's Reports, 304, 361,) an exception was taken to the return of the refusal of the state court to enter a prior judgment of reversal by this court, because it was not made by the judge of the state court to which the writ was directed; but the exception was overruled, and the return was held sufficient. In *Buel* v. *Van Ness*, (8 Wheaton's Reports, 312,) also a writ of error to a state court, the record was authenticated in the same manner. No exception was taken to it. These were civil cases. But it has been truly said at the bar, that, in regard to this process, the law makes no distinction between a criminal and civil case. The same return is required in both. If the sanction of the court could be necessary for the establishment of this position, it has been silently given.

M'Culloch v. *The State of Maryland*, (4 Wheaton's Reports, 316) was a *qui tam* action brought to recover a penalty, and the record was authenticated by the seal of the court and the signature of the clerk, without that of a judge. *Brown et al.* v. *The State of Maryland* was an indictment for a fine and forfeit-

ure. The record in this case, too, was authenticated by the seal of the court and the certificate of the clerk. The practice is both ways.

The record, then, according to the judiciary act, and the rule and the practice of the court, is regularly before us. The more important inquiry is, Does it exhibit a case cognizable by this tribunal?

The indictment charges the plaintiff in error, and others, being white persons, with the offence of "residing within the limits of the Cherokee nation without a license," and "without having taken the oath to support and defend the constitution and laws of the state of Georgia."

The defendant in the state court appeared in proper person, and filed the following plea :—

"And the said Samuel A. Worcester, in his own proper person, comes and says that this court ought not to take further cognizance of the action and prosecution aforesaid, because, he says, that, on the 15th day of July in the year 1831, he was, and still is, a resident in the Cherokee nation; and that the said supposed crime or crimes, and each of them, were committed, if committed at all, at the town of New Echota, in the said Cherokee nation, out of the jurisdiction of this court, and not in the county of Gwinnet, or elsewhere, within the jurisdiction of this court. And this defendant saith that he is a citizen of the state of Vermont, one of the United States of America, and that he entered the aforesaid Cherokee nation in the capacity of a duly authorized missionary of the American Board of Commissioners for Foreign Missions, under the authority of the president of the United States, and has not since been required by him to leave it; that he was, at the time of his arrest, engaged in preaching the gospel to the Cherokee Indians, and in translating the Sacred Scriptures into their language, with the permission and approval of the said Cherokee nation, and in accordance with the humane policy of the government of the United States, for the civilization and improvement of the Indians; and that his residence there, for this purpose, is the resi-

6 Pet. 538.

dence charged in the aforesaid indictment. And this defendant further saith that this prosecution the state of Georgia ought not to have or maintain, because he saith that several treaties have, from time to time, been entered into between the United States and the Cherokee nation of Indians, to wit, at Hopewell, on the 28th day of November, 1785; at Holston, on the 2d day of July, 1791; at Philadelphia, on the 26th day of June, 1794; at Tellico, on the 2d day of October, 1798; at Tellico, on the 24th day of October, 1804; at Tellico, on the 25th day of October, 1805; at Tellico, on the 27th day of October, 1805; at Washington city, on the 7th day of January, 1806; at Washington city, on the 22d day of March, 1816; at the Chickasaw Council House, on the 14th day of September, 1816; at the Cherokee Agency, on the 8th day of July, 1817; and at Washington city, on the 27th day of February, 1819; all which treaties have been duly ratified by the senate of the United States of America; and by which treaties the United States of America acknowledge the said Cherokee nation to be a sovereign nation, authorized to govern themselves, and all persons who have settled within their territory, free from any right of legislative interference by the several states composing the United States of America, in reference to acts done within their own territory; and by which treaties the whole of the territory now occupied by the Cherokee nation, on the east of the Mississippi, has been solemnly guaranteed to them; all of which treaties are existing treaties at this day, and in full force. By these treaties, and particularly by the treaties of Hopewell and Holston, the aforesaid territory is acknowledged to lie without the jurisdiction of the several states composing the union of the United States; and it is thereby specially stipulated that the citizens of the United States shall not enter the aforesaid territory, even on a visit, without a passport from the governor of a state, or from some one duly authorized thereto, by the president of the United States; all of which will more fully and at large appear by reference to the aforesaid treaties. And this defendant saith that the several acts charged in the bill of indictment were done, or omitted to be done, if at

all, within the said territory so recognized as belonging to the said nation, and so, as aforesaid, held by them, under the guaranty of the United States; that for those acts the defendant is not amenable to the laws of Georgia, nor to the jurisdiction of the courts of the said state; and that the laws of the state of Georgia, which profess to add the said territory to the several adjacent counties of the said state, and to extend the laws of Georgia over the said territory and persons inhabiting the same, and, in particular, the act on which this indictment against this defendant is grounded, to wit, an act entitled "An Act to prevent the Exercise of assumed and arbitrary Power, by all Persons, under Pretext of Authority from the Cherokee Indians, and their Laws, and to prevent White Persons from residing within that Part of the chartered Limits of Georgia occupied by the Cherokee Indians, and to provide a Guard for the Protection of the Gold Mines, and to enforce the Laws of the State within the aforesaid Territory," are repugnant to the aforesaid treaties; which, according to the constitution of the United States, compose a part of the supreme law of the land; and that these laws of Georgia are, therefore, unconstitutional, void, and of no effect; that the said laws of Georgia are also unconstitutional and void because they impair the obligation of the various contracts formed by and between the aforesaid Cherokee nation and the said United States of America, as above recited; also, that the said laws of Georgia are unconstitutional and void because they interfere with, and attempt to regulate and control, the intercourse with the said Cherokee nation, which, by the said constitution, belongs exclusively to the congress of the United States; and because the said laws are repugnant to the statute of the United States, passed on the———day of March, 1802, entitled "An Act to regulate Trade and Intercourse with the Indian Tribes, and to preserve Peace on the Frontiers;" and that, therefore, this court has no jurisdiction to cause this defendant to make farther or other answer to the said bill of indictment, or further to try and punish this defendant for the said supposed offence or offences alleged in the bill of indict-

ment, or any of them; and, therefore, this defendant prays judgment whether he shall be held bound to answer further to said indictment."

This plea was overruled by the court. And the prisoner, being arraigned, plead not guilty. The jury found a verdict against him, and the court sentenced him to hard labor, in the penitentiary, for the term of four years.

By overruling this plea the court decided that the matter it contained was not a bar to the action. The plea, therefore, must be examined, for the purpose of determining whether it makes a case which brings the party within the provisions of the twenty-fifth section of the "Act to establish the judicial Courts of the United States."

The plea avers that the residence charged in the indictment was under the authority of the president of the United States, and with the permission and approval of the Cherokee nation; that the treaties subsisting between the United States and the Cherokees acknowledge their right, as a sovereign nation, to govern themselves and all persons who have settled within their territory, free from any right of legislative interference by the several states composing the United States of America; that the act under which the prosecution was instituted is repugnant to the said treaties, and is, therefore, unconstitutional and void; that the said act is also unconstitutional because it interferes with, and attempts to regulate and control, the intercourse with the Cherokee nation, which belongs exclusively to congress; and because, also, it is repugnant to the statute of the United States, entitled "An Act to regulate Trade and Intercourse with the Indian Tribes, and to preserve Peace on the Frontiers."

Let the averments of this plea be compared with the twenty-fifth section of the judicial act.

That section enumerates the cases in which the final judgment or decree of a state court may be revised in the supreme court of the United States. These are, "where is drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision is against their valid-

6 Pet. 540.

ity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of such their validity; or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision is against the title, right, privilege, or exemption, specially set up or claimed by either party under such clause of the said constitution, treaty, statute, or commission."

The indictment and plea in this case draw in question, we think, the validity of the treaties made by the United States with the Cherokee Indians; if not so, their construction is certainly drawn in question; and the decision has been, if not against their validity, "against the right, privilege, or exemption, specially set up and claimed under them." They also draw into question the validity of a statute of the state of Georgia, "on the ground of its being repugnant to the constitution, treaties, and laws of the United States, and the decision is in favor of its validity."

It is, then, we think, too clear for controversy, that the act of congress, by which this court is constituted, has given it the power, and, of course, imposed on it the duty, of exercising jurisdiction in this case. This duty, however unpleasant, cannot be avoided. Those who fill the judicial department have no discretion in selecting the subjects to be brought before them. We must examine the defence set up in this plea. We must inquire and decide whether the act of the legislature of Georgia, under which the plaintiff in error has been prosecuted and condemned, be consistent with, or repugnant to, the constitution, laws, and treaties of the United States.

It has been said at the bar that the acts of the legislature of Georgia seize on the whole Cherokee country, parcel it out among the neighboring counties of the state, extend her code over the whole country, abolish its institutions and its laws, and annihilate its political existence.

6 Pet. 541.

If this be the general effect of the system, let us inquire into the effect of the particular statute and section on which the indictment is founded.

It enacts that "all white persons, residing within the limits of the Cherokee nation on the 1st day of March next, or at any time thereafter, without a license or permit from his excellency the governor, or from such agent as his excellency the governor shall authorize to grant such permit or license, and who shall not have taken the oath hereinafter required, shall be guilty of a high misdemeanor, and, upon conviction thereof, shall be punished by confinement to the penitentiary, at hard labor, for a term not less than four years."

The eleventh section authorizes the governor, should he deem it necessary for the protection of the mines, or the enforcement of the laws in force within the Cherokee nation, to raise and organize a guard, &c.

The thirteenth section enacts "that the said guard, or any member of them, shall be, and they are hereby, authorized and empowered to arrest any person legally charged with, or detected in, a violation of the laws of this state, and to convey, as soon as practicable, the person so arrested before a justice of the peace, judge of the superior, or justice of an inferior court of this state, to be dealt with according to law."

The extra-territorial power of every legislature being limited in its action to its own citizens or subjects, the very passage of this act is an assertion of jurisdiction over the Cherokee nation, and of the rights and powers consequent on jurisdiction.

The first step, then, in the inquiry, which the constitution and laws impose on this court, is an examination of the rightfulness of this claim.

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful

6 Pet. 542.

original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.

After lying concealed for a series of ages, the enterprise of Europe, guided by nautical science, conducted some of her adventurous sons into this western world. They found it in possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting, and fishing.

Did these adventurers, by sailing along the coast, and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil, from the Atlantic to the Pacific; or rightful dominion over the numerous people who occupied it? Or has nature, or the great Creator of all things, conferred these rights over hunters and fishermen, on agriculturists and manufacturers?

But power, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin; because holding it in our recollection might shed some light on existing pretentions.

The great maritime powers of Europe discovered and visited different parts of this continent at nearly the same time. The object was too immense for any one of them to grasp the whole; and the claimants were too powerful to submit to the exclusive or unreasonable pretensions of any single potentate. To avoid bloody conflicts, which might terminate disastrously to all, it was necessary for the nations of Europe to establish some principle which all would acknowledge, and which should decide their respective rights as between themselves. This principle, suggested by the actual state of things, was, "that discovery gave title to the government by whose subjects or by

6 Pet. 543.

whose authority it was made, against all other European governments, which title might be consummated by possession." (8 Wheaton's Reports, 573.)

This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil, and of making settlements on it. It was an exclusive principle, which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.

The relation between the Europeans and the natives was determined in each case by the particular government which asserted and could maintain this pre-emptive privilege in the particular place. The United States succeeded to all the claims of Great Britain, both territorial and political; but no attempt, so far as is known, has been made to enlarge them. So far as they existed merely in theory, or were in their nature only exclusive of the claims of other European nations, they still retain their original character, and remain dormant. So far as they have been practically exerted, they exist in fact, are understood by both parties, are asserted by the one, and admitted by the other.

Soon after Great Britain determined on planting colonies in America, the king granted charters to companies of his subjects who associated for the purpose of carrying the views of the crown into effect, and of enriching themselves. The first of these charters was made before possession was taken of any part of the country. They purport, generally, to convey the soil, from the Atlantic to the South Sea. This soil was occupied by numerous and warlike nations, equally willing and able

6 Pet. 544.

to defend their possessions. The extravagant and absurd idea, that the feeble settlements made on the sea-coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. The crown could not be understood to grant what the crown did not affect to claim; nor was it so understood.

The power of making war is conferred by these charters on the colonies, but defensive war alone seems to have been contemplated. In the first charter to the first and second colonies, they are empowered, "for their several *defences*, to encounter, expulse, repel, and resist, all persons who shall, without license," attempt to inhabit "within the said precincts and limits of the said several colonies, or that shall enterprise or attempt, at any time hereafter, the least detriment or annoyance of the said several colonies or plantations."

The charter to Connecticut concludes a general power to make defensive war with these terms: And, upon *just causes*, to invade and destroy the natives or other enemies of the said colony."

The same power, in the same words, is conferred on the government of Rhode Island.

This power to repel invasion, and, upon just cause, to invade and destroy the natives, authorizes offensive as well as defensive war, but only "on just cause." The very terms imply the existence of a country to be invaded, and of an enemy who has given just cause of war.

The charter to William Penn contains the following recital: "And because, in so remote a country, near so many barbarous nations, the incursions, as well of the savages themselves as of other enemies, pirates, and robbers, may probably be feared, therefore we have given," &c. The instrument then confers the power of war.

6 Pet. 545.

These barbarous nations, whose incursions were feared, and to repel whose incursions the power to make war was given, were surely not considered as the subjects of Penn, or occupying his lands during his pleasure.

The same clause is introduced into the charter to Lord Baltimore.

The charter to Georgia professes to be granted for the charitable purpose of enabling poor subjects to gain a comfortable subsistence by cultivating lands in the American provinces, "at present waste and desolate." It recites: "And whereas our provinces in North America have been frequently ravaged by Indian enemies, more especially that of South Carolina, which, in the late war, by the neighboring savages, was laid waste by fire and sword, and great numbers of the English inhabitants miserably massacred; and our loving subjects, who now inhabit there, by reason of the smallness of their numbers, will, in case of any new war, be exposed to the like calamities, inasmuch as their whole southern frontier continueth unsettled, and lieth open to the said savages."

These motives for planting the new colony are incompatible with the lofty ideas of granting the soil, and all its inhabitants, from sea to sea. They demonstrate the truth, that these grants asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned. The power of war is given only for defence, not for conquest.

The charters contain passages showing one of their objects to be the civilization of the Indians, and their conversion to Christianity,— objects to be accomplished by conciliatory conduct and good example; not by extermination.

The actual state of things, and the practice of European nations, on so much of the American continent as lies between the Mississippi and the Atlantic, explain their claims, and the charters they granted. Their pretensions unavoidably interfered with each other; though the discovery of one was admitted by all to exclude the claim of any other, the extent of

6 Pet. 546.

that discovery was the subject of unceasing contest. Bloody conflicts arose between them, which gave importance and security to the neighboring nations. Fierce and warlike in their character, they might be formidable enemies, or effective friends. Instead of rousing their resentments, by asserting claims to their lands, or to dominion over their persons, their alliance was sought by flattering professions, and purchased by rich presents. The English, the French, and the Spaniards, were equally competitors for their friendship and their aid. Not well acquainted with the exact meaning of words, nor supposing it to be material whether they were called the subjects, or the children, of their father in Europe; lavish in professions of duty and affection, in return for the rich presents they received; so long as their actual independence was untouched, and their right to self-government acknowledged, they were willing to profess dependence on the power which furnished supplies of which they were in absolute need, and restrained dangerous intruders from entering their country; and this was probably the sense in which the term was understood by them.

Certain it is that our history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their lands, when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies; but never intruded into the interior of their affairs, or interfered with their self-government, so far as respected themselves only.

The general views of Great Britain with regard to the Indians were detailed by Mr. Stuart, superintendent of Indian affairs, in a speech delivered at Mobile, in presence of several persons of distinction, soon after the peace of 1763. Towards the conclusion he says, "Lastly, I inform you that it is the king's order to all his governors and subjects, to treat Indians with

justice and humanity, and to forbear all encroachments on the territories allotted to them; accordingly, all individuals are prohibited from purchasing any of your lands; but, as you know, that, as your white brethren cannot feed you when you visit them unless you give them ground to plant, it is expected that you will cede lands to the king for that purpose. But whenever you shall be pleased to surrender any of your territories to his majesty, it must be done, for the future, at a public meeting of your nation, when the governors of the provinces, or the superintendent shall be present, and obtain the consent of all your people. The boundaries of your hunting grounds will be accurately fixed, and no settlement permitted to be made upon them. As you may be assured that all treaties with your people will be faithfully kept, so it is expected that you, also, will be careful strictly to observe them."

The proclamation issued by the king of Great Britain, in 1763, soon after the ratification of the articles of peace, forbids the governors of any of the colonies to grant warrants of survey, or pass patents upon any lands whatever, which, not having been ceded to, or purchased by, us (the king), as aforesaid, are reserved to the said Indians, or any of them.

The proclamation proceeds: "And we do further declare it to be our royal will and pleasure, for the present, as aforesaid, to reserve, under our sovereignty, protection, and dominion, for the use of the said Indians, all the lands and territories lying to the westward of the sources of the rivers which fall into the sea from the west and northwest as aforesaid; and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatever, or taking possession of any of the lands above reserved, without our special leave and license for that purpose first obtained.

"And we do further strictly enjoin and require all persons whatever, who have, either wilfully or inadvertently, seated themselves upon any lands within the countries above described, or upon any other lands, which, not having been ceded

6 Pet. 548.

to, or purchased by us, are still reserved to the said Indians, as aforesaid, forthwith to remove themselves from such settlements."

A proclamation, issued by Governor Gage, in 1772, contains the following passage: "Whereas many persons, contrary to the positive orders of the king upon this subject, have undertaken to make settlements beyond the boundaries fixed by the treaties made with the Indian nations, which boundaries ought to serve as a barrier between the whites and the said nations; particularly on the Ouabache." The proclamation orders such persons to quit those countries without delay.

Such was the policy of Great Britain towards the Indian nations inhabiting the territory from which she excluded all other Europeans, such her claims, and such her practical exposition of the charters she had granted; she considered them as nations capable of maintaining the relations of peace and war, of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged.

This was the settled state of things when the war of our revolution commenced. The influence of our enemy was established; her resources enabled her to keep up that influence; and the colonists had much cause for the apprehension that the Indian nations would, as the allies of Great Britain, add their arms to hers. This, as was to be expected, became an object of great solicitude to congress. Far from advancing a claim to their lands, or asserting any right of dominion over them, congress resolved "that the securing and preserving the friendship of the Indian nations appears to be a subject of the utmost moment to these colonies."

The early journals of congress exhibit the most anxious desire to conciliate the Indian nations. Three Indian departments were established; and commissioners appointed in each, "to treat with the Indians, in their respective departments, in the name and on the behalf of the United Colonies, in order to preserve peace and friendship with the said Indians, and to prevent their taking any part in the present commotions."

The most strenuous exertions were made to procure those supplies on which Indian friendships were supposed to depend; and everything which might excite hostility was avoided.

The first treaty was made with the Delawares, in September, 1778.

The language of equality in which it is drawn evinces the temper with which the negotiation was undertaken, and the opinion which then prevailed in the United States.

"1. That all offences or acts of hostilities, by one or either of the contracting parties against the other, be mutually forgiven, and buried in the depth of oblivion, never more to be had in remembrance.

"2. That a perpetual peace and friendship shall, from henceforth, take place and subsist between the contracting parties aforesaid, through all succeeding generations; and if either of the parties are engaged in a just and necessary war with any other nation or nations, that then each shall assist the other, in due proportion to their abilities, till their enemies are brought to reasonable terms of accommodation," &c.

3. The third article stipulates, among other things, a free passage for the American troops through the Delaware nation; and engages that they shall be furnished with provisions and other necessaries at their value.

"4. For the better security of the peace and friendship now entered into by the contracting parties against all infractions of the same by the citizens of either party, to the prejudice of the other, neither party shall proceed to the infliction of punishments on the citizens of the other, otherwise than by securing the offender or offenders, by imprisonment, or any other competent means, till a fair and impartial trial can be had by judges or juries of both parties, as near as can be to the laws, customs, and usages of the contracting parties, and natural justice."

5. The fifth article regulates the trade between the contracting parties, in a manner entirely equal.

6. The sixth article is entitled to peculiar attention, as it

contains a disclaimer of designs which were, at that time, ascribed to the United States by their enemies, and from the imputation of which congress was then peculiarly anxious to free the government. It is in these words: "Whereas the enemies of the United States have endeavored, by every artifice in their power, to possess the Indians in general with an opinion that it is the design of the states aforesaid to extirpate the Indians, and take possession of their country; to obviate such false suggestion, the United States do engage to guaranty to the aforesaid nation of Delawares, and their heirs, all their territorial rights, in the fullest and most ample manner, as it hath been bounded by former treaties, as long as the said Delaware nation shall abide by and hold fast the chain of friendship now entered into."

The parties further agree that other tribes, friendly to the interest of the United States, may be invited to form a state, whereof the Delaware nation shall be the heads, and have a representation in congress.

This treaty, in its language, and in its provisions, is formed, as near as may be, on the model of treaties between the crowned heads of Europe.

The sixth article shows how congress then treated the injurious calumny of cherishing designs unfriendly to the political and civil rights of the Indians.

During the war of the revolution the Cherokees took part with the British. After its termination, the United States, though desirous of peace, did not feel its necessity so strongly as while the war continued. Their political situation being changed, they might very well think it advisable to assume a higher tone, and to impress on the Cherokees the same respect for congress which was before felt for the king of Great Britain. This may account for the language of the treaty of Hopewell. There is the more reason for supposing that the Cherokee chiefs were not very critical judges of the language, from the fact that every one makes his mark; no chief was capable of signing his name. It is probable the treaty was interpreted to them.

6 Pet. 550.

The treaty is introduced with the declaration that "the commissioners plenipotentiary of the United States give peace to all the Cherokees, and receive them into the favor and protection of the United States of America, on the following conditions."

When the United States gave peace, did they not also receive it? Were not both parties desirous of it? If we consult the history of the day, does it not inform us that the United States were at least as anxious to obtain it as the Cherokees? We may ask, further, Did the Cherokees come to the seat of the American government to solicit peace; or did the American commissioners go to them to obtain it? The treaty was made at Hopewell, not at New York. The word "give," then, has no real importance attached to it.

The first and second articles stipulate for the mutual restoration of prisoners, and are, of course, equal.

The third article acknowledges the Cherokees to be under the protection of the United States of America, and of no other power.

This stipulation is found in Indian treaties, generally. It was introduced into their treaties with Great Britain; and may, probably, be found in those with other European powers. Its origin may be traced to the nature of their connexion with those powers; and its true meaning is discerned in their relative situation.

The general law of European sovereigns respecting their claims in America limited the intercourse of Indians, in a great degree, to the particular potentate whose ultimate right of domain was acknowledged by the others. This was the general state of things in time of peace. It was sometimes changed in war. The consequence was that their supplies were derived chiefly from that nation, and their trade confined to it. Goods, indispensable to their comfort, in the shape of presents, were received from the same hand. What was of still more importance, the strong hand of government was interposed to restrain the disorderly and licentious from intrusions into their country,

6 Pet. 551.

from encroachments on their lands, and from those acts of violence which were often attended by reciprocal murder. The Indians perceived in this protection only what was beneficial to themselves,—an engagement to punish aggressions on them. It involved, practically, no claim to their lands, no dominion over their persons. It merely bound the nation to the British crown, as a dependent ally, claiming the protection of a powerful friend and neighbor, and receiving the advantages of that protection, without involving a surrender of their national character.

This is the true meaning of the stipulation, and is, undoubtedly, the sense in which it was made. Neither the British government, nor the Cherokees, ever understood it otherwise.

The same stipulation entered into with the United States is, undoubtedly, to be construed in the same manner. They receive the Cherokee nation into their favor and protection. The Cherokees acknowledge themselves to be under the protection of the United States, and of no other power. Protection does not imply the destruction of the protected. The manner in which this stipulation was understood by the American government is explained by the language and acts of our first president.

The fourth article draws the boundary between the Indians and the citizens of the United States. But in describing this boundary, the term "allotted" and the term "hunting ground" are used.

Is it reasonable to suppose that the Indians, who could not write, and, most probably, could not read, who certainly were not critical judges of our language, should distinguish the word "allotted" from the words "marked out"? The actual subject of contract was the dividing line between the two nations, and their attention may very well be supposed to have been confined to that subject. When, in fact, they were ceding lands to the United States, and describing the extent of their cession, it may very well be supposed that they might not understand the term employed, as indicating, that, instead of grant-

6 Pet. 552.

ing, they were receiving lands. If the term would admit of no other signification, which is not conceded, its being misunderstood is so apparent, results so necessarily from the whole transaction, that it must, we think, be taken in the sense in which it was, most obviously, used.

So with respect to the words "hunting grounds." Hunting was at that time the principal occupation of the Indians, and their land was more used for that purpose than for any other. It could not, however, be supposed that any intention existed of restricting the full use of the lands they reserved.

To the United States it could be a matter of no concern, whether their whole territory was devoted to hunting grounds, or whether an occasional village and an occasional corn-field interrupted and gave some variety to the scene.

These terms had been used in their treaties with Great Britain, and had never been misunderstood. They had never been supposed to imply a right in the British government to take their lands, or to interfere with their internal government.

The fifth article withdraws the protection of the United States from any citizen who has settled, or shall settle, on the lands allotted to the Indians for their hunting grounds; and stipulates, that, if he shall not remove within six months, the Indians may punish him.

The sixth and seventh articles stipulate for the punishment of the citizens of either country who may commit offences on or against the citizens of the other. The only inference to be drawn from them is that the United States considered the Cherokees as a nation.

The ninth article is in these words: "For the benefit and comfort of the Indians, and for the prevention of injuries or oppression on the part of the citizens or Indians, the United States, in congress assembled, shall have the sole and exclusive right of regulating the trade with the Indians, and *managing all their affairs*, as they think proper."

To construe the expression, "managing all their affairs," into a surrender of self-government, would be, we think, a perver-

6 Pet. 553.

sion of their necessary meaning, and a departure from the construction which has been uniformly put on them. The great subject of the article is the Indian trade. The influence it gave made it desirable that congress should possess it. The commissioners brought forward the claim with the profession that their motive was "the benefit and comfort of the Indians, and the prevention of injuries or oppressions." This may be true as respects the regulation of their trade, and as respects the regulation of all affairs connected with their trade, but cannot be true as respects the management of all their affairs. The most important of these are the cession of their lands, and security against intruders on them. Is it credible that they should have considered themselves as surrendering to the United States the right to dictate their future cessions, and the terms on which they should be made? or to compel their submission to the violence of disorderly and licentious intruders? It is equally inconceivable that they could have supposed themselves, by a phrase thus slipped into an article on another and most interesting subject, to have divested themselves of the right of self-government on subjects not connected with trade. Such a measure could not be "for their benefit and comfort," or for "the prevention of injuries and oppression." Such a construction would be inconsistent with the spirit of this and of all subsequent treaties; especially of those articles which recognize the right of the Cherokees to declare hostilities, and to make war. It would convert a treaty of peace covertly into an act annihilating the political existence of one of the parties. Had such a result been intended, it would have been openly avowed.

This treaty contains a few terms capable of being used in a sense which could not have been intended at the time, and which is inconsistent with the practical construction which has always been put on them; but its essential articles treat the Cherokees as a nation capable of maintaining the relations of peace and war, and ascertain the boundaries between them and the United States.

The treaty of Hopewell seems not to have established a solid

6 Pet. 554.

peace. To accommodate the differences still existing between the state of Georgia and the Cherokee nation, the treaty of Holston was negotiated in July, 1791. The existing constitution of the United States had been then adopted, and the government, having more intrinsic capacity to enforce its just claims, was, perhaps, less mindful of high-sounding expressions, denoting superiority. We hear no more of giving peace to the Cherokees. The mutual desire of establishing permanent peace and friendship, and of removing all causes of war, is honestly avowed, and, in pursuance of this desire, the first article declares that there shall be perpetual peace and friendship between all the citizens of the United States of America and all the individuals composing the Cherokee nation.

The second article repeats the important acknowledgment, that the Cherokee nation is under the protection of the United States of America, and of no other sovereign whomsoever.

The meaning of this has been already explained. The Indian nations were, from their situation, necessarily dependent on some foreign potentate for the supply of their essential wants, and for their protection from lawless and injurious intrusions into their country. That power was naturally termed their protector. They had been arranged under the protection of Great Britain; but the extinguishment of the British power in their neighborhood, and the establishment of that of the United States in its place, led naturally to the declaration, on the part of the Cherokees, that they were under the protection of the United States, and of no other power. They assumed the relation with the United States which had before subsisted with Great Britain.

This relation was that of a nation claiming and receiving the protection of one more powerful; not that of individuals abandoning their national character, and submitting as subjects to the laws of a master.

The third article contains a perfectly equal stipulation for the surrender of prisoners.

The fourth article declares that "the boundary between the

United States and the Cherokee nation shall be as follows: beginning," &c. We hear no more of "allotments" or of "hunting grounds." A boundary is described, between nation and nation, by mutual consent. The national character of each, the ability of each to establish this boundary, is acknowledged by the other. To preclude forever all disputes, it is agreed that it shall be plainly marked by commissioners to be appointed by each party; and in order to extinguish forever all claim of the Cherokees to the ceded lands, an additional consideration is to be paid by the United States. For this additional consideration the Cherokees release all right to the ceded land forever.

By the fifth article the Cherokees allow the United States a road through their country, and the navigation of the Tennessee river. The acceptance of these cessions is an acknowledgment of the right of the Cherokees to make or withhold them.

By the sixth article it is agreed, on the part of the Cherokees, that the United States shall have the sole and exclusive right of regulating their trade. No claim is made to the management of all their affairs. This stipulation has already been explained. The observation may be repeated, that the stipulation is itself an admission of their right to make or refuse it.

By the seventh article the United States solemnly guaranty to the Cherokee nation all their lands not hereby ceded.

The eighth article relinquishes to the Cherokees any citizens of the United States who may settle on their lands; and the ninth forbids any citizen of the United States to hunt on their lands, or to enter their country without a passport.

The remaining articles are equal, and contain stipulations which could be made only with a nation admitted to be capable of governing itself.

This treaty, thus explicitly recognizing the national character of the Cherokees and their right of self-government, thus guarantying their lands, assuming the duty of protection, and, of course, pledging the faith of the United States for that protection, has been frequently renewed, and is now in full force.

To the general pledge of protection have been added several

6 Pet. 556.

specific pledges, deemed valuable by the Indians. Some of these restrain the citizens of the United States from encroachments on the Cherokee country, and provide for the punishment of intruders.

From the commencement of our government congress has passed acts to regulate trade and intercourse with the Indians, which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.

In 1819 congress passed an act for promoting those humane designs of civilizing the neighboring Indians which had long been cherished by the executive. It enacts, "that, for the purpose of providing against the further decline and final extinction of the Indian tribes adjoining the frontier settlements of the United States, and for introducing among them the habits and arts of civilization, the president of the United States shall be, and he is hereby, authorized, in every case where he shall judge improvement in the habits and condition of such Indians practicable, and that the means of instruction can be introduced with their own consent, to employ capable persons, of good moral character, to instruct them in the mode of agriculture suited to their situation, and for teaching their children in reading, writing, and arithmetic, and for performing such other duties as may be enjoined, according to such instructions and rules as the president may give and prescribe for the regulation of their conduct in the discharge of their duties."

This act avowedly contemplates the preservation of the Indian nations as an object sought by the United States, and proposes to effect this object by civilizing and converting them from hunters into agriculturists. Though the Cherokees had already made considerable progress in this improvement, it can-

6 Pet. 557.

not be doubted that the general words of the act comprehend them. Their advance in "the habits and arts of civilization" rather encouraged perseverance in the laudable exertions still farther to meliorate their condition. This act furnishes strong additional evidence of a settled purpose to fix the Indians in their country by giving them security at home.

The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union.

Is this the rightful exercise of power, or is it usurpation?

While these states were colonies, this power, in its utmost extent, was admitted to reside in the crown. When our revolutionary struggle commenced, congress was composed of an assemblage of deputies acting under specific powers granted by the legislatures or conventions of the several colonies. It was a great popular movement, not perfectly organized; nor were the respective powers of those who were entrusted with the management of affairs accurately defined. The necessities of our situation produced a general conviction that those measures which concerned all must be transacted by a body in which the representatives of all were assembled, and which could command the confidence of all; congress, therefore, was considered as invested with all the powers of war and peace, and congress dissolved our connexion with the mother country, and declared these United Colonies to be independent states. Without any written definition of powers, they employed diplomatic agents to represent the United States at the several courts of Europe; offered to negotiate treaties with them, and did actually negotiate treaties with France. From the same necessity, and on the same principles, congress assumed the management of Indian affairs; first in the name of these United Colonies; and afterwards, in the name of the United States. Early attempts were made at negotiation, and to regulate trade with them. These not proving successful, war was carried on under the direction and with the forces of the United States, and the

6 Pet. 558.

efforts to make peace, by treaty, were earnest and incessant. The confederation found congress in the exercise of the same powers of peace and war, in our relations with Indian nations, as with those of Europe.

Such was the state of things when the confederation was adopted. That instrument surrendered the powers of peace and war to congress, and prohibited them to the states, respectively, unless a state be actually invaded, "or shall have received certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of delay till the United States in congress assembled can be consulted." This instrument also gave the United States in congress assembled the sole and exclusive right of "regulating the trade and managing all the affairs with the Indians, not members of any of the states; provided that the legislative power of any state within its own limits be not infringed or violated."

The ambiguous phrases which follow the grant of power to the United States were so construed by the states of North Carolina and Georgia as to annul the power itself. The discontents and confusion resulting from these conflicting claims produced representations to congress, which were referred to a committee, who made their report in 1787. The report does not assent to the construction of the two states, but recommends an accommodation, by liberal cessions of territory, or by an admission, on their part, of the powers claimed by congress. The correct exposition of this article is rendered unnecessary by the adoption of our existing constitution. That instrument confers on congress the powers of war and peace, of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions. The shackles imposed on this power in the confederation are discarded.

The Indian nations had always been considered as distinct,

6 Pet. 558.

independent political communities, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and, consequently, admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

Georgia herself has furnished conclusive evidence that her former opinions on this subject concurred with those entertained by her sister states, and by the government of the United States. Various acts of her legislature have been cited in the argument, including the contract of cession made in the year 1802, all tending to prove her acquiescence in the universal conviction, that the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States with their consent; that their territory was separated from that of any state within whose chartered limits they might reside, by a boundary line established by treaties; that within their boundary they possessed rights with which no state could interfere; and that the whole power of regulating the intercourse with them was vested in the United States. A review of these acts on the part of Georgia would occupy too much time, and is the less necessary because they have been accurately detailed in the argument at the bar. Her new series

6 Pet. 559.

of laws, manifesting her abandonment of these opinions, appears to have commenced in December, 1828.

In opposition to this original right, possessed by the undisputed occupants of every country; to this recognition of that right, which is evidenced by our history, in every change through which we have passed; is placed the charters granted by the monarch of a distant and distinct region, parcelling out a territory in possession of others, whom he could not remove, and did not attempt to remove, and the cession made of his claims by the treaty of peace.

The actual state of things at the time, and all history since, explain these charters; and the king of Great Britain, at the treaty of peace, could cede only what belonged to his crown. These newly asserted titles can derive no aid from the articles, so often repeated in Indian treaties, extending to them, first, the protection of Great Britain, and afterwards that of the United States. These articles are associated with others, recognizing their title to self-government. The very fact of repeated treaties with them recognizes it; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence, its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of self-government, and ceasing to be a state. Examples of this kind are not wanting in Europe. "Tributary and feudatory states," says Vattel, "do not thereby cease to be sovereign and independent states, so long as self-government and sovereign and independent authority are left in the administration of the state." At the present day, more than one state may be considered as holding its right of self-government under the guaranty and protection of one or more allies.

The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent

6 Pet. 560.

of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation is by our constitution and laws vested in the government of the United States.

The act of the state of Georgia, under which the plaintiff in error was prosecuted, is, consequently, void, and the judgment a nullity. Can this court revise and reverse it?

If the objection to the system of legislation lately adopted by the legislature of Georgia, in relation to the Cherokee nation, was confined to its extra-territorial operation, the objection, though complete, so far as respected mere right, would give this court no power over the subject. But it goes much further. If the review which has been taken be correct, and we think it is, the acts of Georgia are repugnant to the constitution, laws, and treaties of the United States.

They interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, is committed exclusively to the government of the union.

They are in direct hostility with treaties, repeated in a succession of years, which mark out the boundary that separates the Cherokee country from Georgia, guaranty to them all the land within their boundary, solemnly pledge the faith of the United States to restrain their citizens from trespassing on it, and recognize the pre-existing power of the nation to govern itself.

They are in equal hostility with the acts of congress for regulating this intercourse, and giving effect to the treaties.

The forcible seizure and abduction of the plaintiff in error, who was residing in the nation with its permission, and by authority of the president of the United States, is also a violation of the acts which authorize the chief magistrate to exercise this authority.

Will these powerful considerations avail the plaintiff in error? We think they will. He was seized, and forcibly carried away, while under guardianship of treaties guarantying the country

in which he resided, and taking it under the protection of the United States. He was seized, while performing, under the sanction of the chief magistrate of the union, those duties which the humane policy adopted by congress had recommended. He was apprehended, tried, and condemned, under color of a law which has been shown to be repugnant to the constitution, laws, and treaties of the United States. Had a judgment, liable to the same objections, been rendered for property, none would question the jurisdiction of this court. It cannot be less clear when the judgment affects personal liberty, and inflicts disgraceful punishment, if punishment could disgrace when inflicted on innocence. The plaintiff in error is not less interested in the operation of this unconstitutional law than if it affected his property. He is not less entitled to the protection of the constitution, laws, and treaties of his country.

This point has been elaborately argued, and, after deliberate consideration, decided, in the case of *Cohens* v. *The Commonwealth of Virginia*, (6 Wheaton's Reports, 264.)

It is the opinion of this court that the judgment of the superior court for the county of Gwinnett, in the state of Georgia, condemning Samuel A. Worcester to hard labor, in the penitentiary of the state of Georgia, for four years, was pronounced by that court under color of a law which is void, as being repugnant to the constitution, treaties, and laws of the United States, and ought, therefore, to be reversed and annulled.

Pet. 562.

BARRON v. THE MAYOR AND CITY COUNCIL OF BALTIMORE.

JANUARY TERM, 1833.

[7 Peters's Reports, 243–251.]

Barron and others owned a very valuable wharf in Baltimore harbor; the city by embankments and other means so directed certain streams of water as to collect the sand about this wharf to such a degree as to impair its value. Barron sued the city, and obtained a judgment in the county court, which was reversed by the court of appeals. He then sued out a writ of error to the supreme court, the opinion of which was delivered by the chief justice as follows :—

The judgment brought up by this writ of error having been rendered by the court of a state, this tribunal can exercise no jurisdiction over it, unless it be shown to come within the provisions of the twenty-fifth section of the judicial act.

The plaintiff in error contends that it comes within that clause in the fifth amendment to the constitution, which inhibits the taking of private property for public use, without just compensation. He insists that this amendment, being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a state, as well as that of the United States. If this proposition be untrue, the court can take no jurisdiction of the cause.

The question thus presented is, we think, of great importance, but not of much difficulty.

The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and in that constitu-

7 Pet. 247.

tion provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.

If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government, not as applicable to the states. In their several constitutions they have imposed such restrictions on their respective governments as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no farther than they are supposed to have a common interest.

The counsel for the plaintiff in error insists that the constitution was intended to secure the people of the several states against the undue exercise of power by their respective state governments, as well as against that which might be attempted by their general government. In support of this argument he relies on the inhibitions contained in the tenth section of the first article.

We think that section affords a strong if not a conclusive argument in support of the opinion already indicated by the court.

The preceding section contains restrictions which are obviously intended for the exclusive purpose of restraining the exercise of power by the departments of the general government. Some of them use language applicable only to congress; others are expressed in general terms. The third clause, for example, declares that "no bill of attainder or ex post facto law shall be passed." No language can be more general; yet the demonstration is complete, that it applies solely to the govern-

ment of the United States. In addition to the general arguments furnished by the instrument itself, some of which have been already suggested, the succeeding section, the avowed purpose of which is to restrain state legislation, contains in terms the very prohibition. It declares that "no state shall pass any bill of attainder or ex post facto law." This provision, then, of the ninth section, however comprehensive its language, contains no restriction on state legislation.

The ninth section having enumerated, in the nature of a bill of rights, the limitations intended to be imposed on the powers of the general government, the tenth proceeds to enumerate those which were to operate on the state legislatures. These restrictions are brought together in the same section, and are by express words applied to the states. "No state shall enter into any treaty," &c. Perceiving, that, in a constitution framed by the people of the United States for the government of all, no limitation of the action of government on the people would apply to the state government, unless expressed in terms; the restrictions contained in the tenth section are in direct words so applied to the states.

It is worthy of remark, too, that these inhibitions generally restrain state legislation on subjects entrusted to the general government, or in which the people of all the states feel an interest.

A state is forbidden to enter into any treaty, alliance, or confederation. If these compacts are with foreign nations, they interfere with the treaty-making power which is conferred entirely on the general government, if with each other, for political purposes, they can scarcely fail to interfere with the general purpose and intent of the constitution. To grant letters of marque and reprisal would lead directly to war; the power of declaring which is expressly given to congress. To coin money is also the exercise of a power conferred on congress. It would be tedious to recapitulate the several limitations on the powers of the states which are contained in this section. They will be found, generally, to restrain state legislation on subjects en-

trusted to the government of the union, in which the citizens of all the states are interested. In these alone were the whole people concerned. The question of their application to states is not left to construction. It is averred in positive words.

If the original constitution, in the ninth and tenth sections of the first article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the general government, and on those of the states; if, in every inhibition intended to act on state power, words are employed which directly express that intent; some strong reason must be assigned for departing from this safe and judicious course in framing the amendments, before that departure can be assumed.

We search in vain for that reason.

Had the people of the several states, or any of them, required changes in their constitutions; had they required additional safeguards to liberty from the apprehended encroachments of their particular governments; the remedy was in their own hands, and would have been applied by themselves. A convention would have been assembled by the discontented state, and the required improvements would have been made by itself. The unwieldy and cumbrous machinery of procuring a recommendation from two-thirds of congress, and the assent of three-fourths of their sister states, could never have occurred to any human being as a mode of doing that which might be effected by the state itself. Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention. Had congress engaged in the extraordinary occupation of improving the constitutions of the several states by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.

But it is universally understood, it is a part of the history of the day, that the great revolution which established the constitution of the United States was not effected without immense

7 Pet. 250.

opposition. Serious fears were extensively entertained that those powers, which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government, not against those of the local governments.

In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the states. These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.

We are of opinion that the provision in the fifth amendment to the constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states. We are, therefore, of opinion that there is no repugnancy between the several acts of the general assembly of Maryland, given in evidence by the defendants at the trial of this cause in the court of that state, and the constitution of the United States. This court, therefore, has no jurisdiction of the cause; and it is dismissed.

7 Pet. 250.

THE BRIG WILSON *v.* THE UNITED STATES.

C. C. DISTR. VA. AND N. C., MAY TERM, 1820.

[1 Brockenbrough's Reports, 423–439.]

The Wilson, a South American privateer, brought into Norfolk, Virginia, (whither she came to refit,) certain cases of spirits taken from a prize she had captured, which spirits she had kept as stores, but did not enter them according to law. She also landed some colored sailors, though the laws of the United States forbade it. She was libelled by the United States for breaking the laws, and was adjudged to be forfeited by the district court. Her commander appealed to the circuit court, the opinion of which was given by Chief Justice Marshall as follows :—

The four first counts of this case present, for the consideration of the court, a general question of considerable importance. It is this : Does the act "to regulate the collection of duties on imports and tonnage" apply to privateers, not engaged in the importation of goods ?

The thirty-first section enacts "that it shall not be necessary for the master, or person having the command of any ship or vessel of war, &c., to make such report and entry as aforesaid."

If the words, "ship or vessel of war," be construed to comprehend a privateer, there is an end of this part of the case; because, if no report or entry is required, it cannot be pretended that any of the provisions of the act extend to a privateer, demeaning herself in her military character, and not performing the office of a merchant vessel.

The counsel for the appellant has certainly urged many reasons, which have great weight in favor of the construction for

which he contends. The term, "ship or vessel of war," has been considered, and, I think, properly considered, as a generic term, including both national ships and private armed ships. When it is used generally, it comprehends both, unless the context, or the subject-matter, should exclude the one or the other. The authorities cited at the bar show that courts and writers on public law have used the term in this general sense.

If either the language or the objects of this law be consulted, I think they strengthen this natural and comprehensive construction of these words.

The object of the law is, professedly and obviously, to raise a revenue from commerce and consumption, not to regulate the conduct of the ships of war, whether public or private, of foreign nations. All the regulations are obviously calculated for merchant vessels, and not one calculated for privateers, who might come into our ports, although a totally distinct provision for them would certainly be necessary.

The language of the law applies it to vessels destined for the United States, not to vessels destined for a cruise on the high seas. The form of the manifest requires that the importer should state to what port the vessel is bound, and to whom the goods are consigned: regulations not adapted to goods captured at sea by a cruiser.

If this act applies to privateers, the tonnage duty would be demandable. But it cannot be supposed that this duty is imposed on privateers, employed in cruising, and not in the conveyance of merchandise.

It is also an argument which deserves consideration, that the policy of the United States has been unfriendly to the sale, in our ports, of prizes made by foreign privateers on nations with whom we are at peace. Some of our treaties contain express stipulations against it; and the course of the government has been to prohibit the practice, even where no specific engagements bind us to do so. Were the revenue laws applicable to privateers, and to their prizes and prize goods, they would give a right to introduce those goods, in opposition to the avowed

1 Br. 429.

and uniform policy of the government. The doctrine, that the validity of prizes could not be adjudged in our ports, would be of little importance, if they could be brought in and sold.

I think, then, that our revenue laws do not apply to privateers, unless they take up the character of merchantmen, by attempting to import goods. When they do so, they attempt, under the garb of their military character, to conceal real commercial transactions. This would be fraud on the revenue laws, which no nation will or ought to tolerate. The privateer which acts as a merchant vessel must be treated and considered as a merchant vessel.

In this case there is no evidence that any goods were landed, or that more were brought in, than were intended to be carried out. The only evidence, which I think at all important, is that of the pilot. His testimony, certainly, excited suspicion. Opposed to it, however, is the testimony of the witnesses belonging to the vessel, who say that the spirits were designed for the crew, to be used as stores.

I proceed, now, to the fifth count in the libel.

The first question which will be considered in this part of the case will be the constitutionality of the act of congress under which this condemnation has been made.

It will readily be admitted that the power of the legislature of the union, on this subject, is derived entirely from the third clause of the eighth section of the first article of the constitution. That clause enables congress "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

What is the extent of this power to regulate commerce? Does it not comprehend the navigation of the country? May not the vessels, as well as the articles they bring, be regulated? Upon what principle is it that the ships of any foreign nation have been forbidden, under pain of forfeiture, to enter our ports? The authority to make such laws has never been questioned; and yet it can be sustained by no other clause in the constitution than that which enables congress to regulate commerce.

1 Br. 430.

If this power over vessels is not in congress, where does it reside? Certainly it is not annihilated; and if not, it must reside somewhere. Does it reside in the states? No American politician has ever been so extravagant as to contend for this. No man has been wild enough to maintain, that, although the power to regulate commerce gives congress an unlimited power over the cargoes, it does not enable that body to control the vehicle in which they are imported; that, while the whole power of commerce is vested in congress, the state legislatures may confiscate every vessel which enters their ports, and congress is unable to prevent their entry. Let it be admitted, for the sake of argument, that a law forbidding a free man of any color to come into the United States would be void, and that no penalty imposed on him by congress could be enforced; still, the vessel which should bring him into the United States might be forfeited, and that forfeiture enforced; since even an empty vessel, or a packet employed solely in the conveyance of passengers and letters, may be regulated and forfeited. There is not, in the constitution, one syllable on the subject of navigation. And yet every power that pertains to navigation has been uniformly exercised, and, in the opinion of all, been rightfully exercised, by congress. From the adoption of the constitution till this time, the universal sense of America has been that the word, "commerce," as used in that instrument, is to be considered a generic term, comprehending navigation, or, that a control over navigation is necessarily incidental to the power to regulate commerce.

I could feel no difficulty in saying that the power to regulate commerce clearly comprehended the case, were there no other clauses in the constitution, showing the sense of the convention on that subject. But there is a clause which would remove the doubt, if any could exist.

The first clause of the ninth section declares that "the migration or importation of such persons as any of the states now existing shall think proper to admit shall not be prohibited by the congress, prior to the year 1808." This has been truly

1 Br. 431.

said to be a limitation of the power of congress to regulate commerce, and it will not be pretended that a limitation of a power is to be construed into a grant of power. But though such a limitation be not a grant, it is certainly evidence of the extent which those who made both the grant and limitation attributed to the grant. The framers of our constitution could never have declared that a given power should not, for a limited time, be exercised on a particular object, if, in their opinion, it could never be exercised on that object.

Suppose the grant and the limitation be brought together, the clause would read thus: "Congress shall have power to regulate commerce, &c., but this power shall not be so exercised as to prohibit the migration or importation of such persons as any of the states now existing may think proper to admit, prior to the year 1808." Would it be possible to doubt that the power to regulate commerce, in the sense in which those words were used in the constitution, included the power to prohibit the migration or importation of any persons whatever into the states, except so far as this power might be restrained by other clauses of the constitution? I think it would be impossible. It appears to me, then, that the power of congress over vessels, which might bring in persons of any description whatever, was complete before the year 1808, except that it could not be so exercised as to prohibit the importation or migration of any persons whom any state, in existence at the formation of the constitution, might think proper to admit. The act of congress, then, is to be construed with a view to this restriction on the power of the legislature; and the only question will be, whether it comprehends this case.

The case is, that the Brig Wilson, a private armed cruiser, commissioned by the government of Buenos Ayres, came into Norfolk, navigated by a crew some of whom were people of color. They were, however, all free men, and all of them sailors composing a part of the crew. While in port some of them were discharged and came on shore.

The libel charges that three persons of color were landed

1 Br. 432.

from the vessel, whose admission or importation was prohibited by the laws of Virginia, contrary to the act of congress, by which the vessel was forfeited.

Is this case within the act of congress, passed the 28th of February, 1803?

The first section, which is the prohibiting part of the act, is in these words: "From and after the first day of April next, no master or captain of any ship or vessel, or any other persons, shall import or bring, or cause to be imported or brought, any negro, mulatto, or any person of color," &c. There are nice shades or gradations in language, which are more readily perceived than described, and the mind impressed with a particular idea readily employs those words which express it most appropriately. Words which have a direct and common meaning may also be used in a less common sense, but we do not understand them in the less common sense, unless the context, or the clear design of the person using them, requires them to be so understood. Now the verbs, "to import" or "to bring in," seem to me to indicate, and are most commonly employed as indicating, the action of a person on anything, animate or inanimate, which is itself passive. The agent, or those who are concerned in the agency or importation, are not, in common language, said to be imported or brought in. It is true that a vessel coming into port is the vehicle which brings in her crew, but we do not, in common language, say that the mariners are "imported," or "brought in" by a particular vessel; we rather say they bring in the vessel. So, too, if the legislature intended to punish the captain of a vessel, for employing seamen of a particular description, or for allowing these seamen to come on shore, we should expect that this intention would be expressed by more appropriate words than "to import" or "bring in." These words are peculiarly applicable to persons not concerned in navigating the vessel. It is not probable, then, that, in making this provision, a regulation respecting the crew of a vessel was in the mind of congress. But it is contended, on the part of the prosecution, that the succeeding words of the sentence, ex-

1 Br. 434.

empting certain descriptions of persons from the general prohibition, show that the prohibition itself was intended to comprehend the crew, as well as those who did not belong to the vessel. Those words are, "not being a native, a citizen, or registered seaman of the United States, or seamen, natives of countries beyond the Cape of Good Hope."

That this limitation proves the prohibition to have been intended to comprehend freemen, as well as slaves, must, I think, be admitted. But it does not follow that it was, also, intended to comprehend the crew of a vessel, actually employed in her navigation, and not put on board in fraud of the law. A person of color, who is a registered seaman of the United States, may be imported or brought into the United States in a vessel in which he is not employed as a mariner. The construction, therefore, which would extend the prohibitory part of the sentence to the crew of the vessel, in consequence of the language of the exception, is not a necessary construction, though I must admit that it derives much strength from that language.

The forfeiture of the vessel is not in this section of the act, but I have noticed its construction, because it is not reasonable to suppose that it was intended to forfeit a vessel for an act which was not prohibited. The second section enacts "that no ship or vessel, arriving in any of the said ports or places of the United States, and *having on board* any negro, mulatto, or other person of color, not being a native, a citizen, or registered seaman of the United States, or seamen, natives of countries beyond the Cape of Good Hope, as aforesaid, shall be admitted to an entry."

It is obvious that this clause was intended to refuse an entry to every vessel which had violated the prohibition contained in the first section; and that the words, "having on board," were used as co-extensive with the words, "import" or "bring in." We had, at that time, a treaty with the emperor of Morocco, and with several other Barbary powers. Their subjects are all people of color. It is true they are not so engaged in commerce as to send ships abroad. But the arrival of a Moorish vessel in our

1 Br. 435.

ports is not an impossibility; and can it be believed that this law was intended to refuse an entry to such a vessel? It may be said that an occurrence which has never taken place, and which, in all probability, never will take place, was not in the mind of congress; and, consequently, the omission to provide for it ought not to influence the construction of their acts. But there are many nations, with whom we have regular commerce, who employ colored seamen. Could it be intended by congress to refuse an entry to a French, a Spanish, an English, or a Portuguese merchant vessel, in whose crew there was a man of color? I think this construction could never be given to the act. The words, "*having on board* a negro, mulatto, or other person of color," would not, I think, be applied to a vessel one of whose crew was a person of color.

The section then proceeds: "And if any such negro, &c., shall be landed from on board any ship or vessel, &c., the said ship or vessel, &c., shall be forfeited."

The words, "shall be landed," seem peculiarly applicable to a person, or thing, which is imported, or *brought in*, and which is landed, not by its own act, but by the authority of the importer; not to a mariner, going on shore voluntarily, or on the business of the ship. The words, "*such* negro," &c., refer to the preceding passages, describing those whom a captain of a vessel is forbidden to import, and whose being on board a vessel excludes such vessel from an entry, and no others. If, then, the commentary which has been made on those passages is correct, the forfeiture is not incurred by a person of color coming in as part of a ship's crew, and going on shore.

Although the powers of Barbary do not send merchant ships across the Atlantic, yet their treaties with us contemplate the possibility of their cruisers entering our ports. Would the cruiser be forfeited, should one of the crew come on shore?

I have contended that the power of congress to regulate commerce comprehends, necessarily, a power over navigation, and warrants every act of national sovereignty which any other

1 Br. 436.

sovereign nation may exercise over vessels, foreign or domestic, which enter our ports. But there is a portion of this power, so far as respects foreign vessels, which it is unusual for any nation to exercise, and the exercise of which would be deemed an unfriendly interference with the just rights of foreign powers. An example of this would be an attempt to regulate the manner in which a foreign vessel should be navigated in order to be admitted into our ports; and to subject such vessel to forfeiture, if not so navigated. I will not say that this is beyond the power of a government, but I will say that no act ought to have this effect given to it, unless the words be such as to admit of no other rational construction.

I will now take some notice of that part of the act which has a reference to the state law.

The language both of the constitution and of the act of congress shows that the forfeiture was not intended to be inflicted in any case but where the state law was violated. In addition to the words, in the first and second sections of the act, which confine its operation to importations into "a state which, by law has prohibited, or shall prohibit, the importation of such negro," &c.; the third section enjoins it on the officers of the United States, in the states having laws containing such prohibition, "to notice and be governed by the provisions of the laws, now existing, of the several states, prohibiting the admission or importation of any negro, mulatto, or any person of color as aforesaid." This is not inflicting a penalty for the violation of a state law, but is limiting the operation of the penal law of the United States by a temporary demarcation given in the constitution. The power of congress to prevent migration or importation was not to be exercised, prior to the year 1808, on any person whom any of the states might think proper to admit. All were admissible who were not prohibited. It was proper, therefore, that the act of congress should make the prohibitory act of the state the limit of its own operation. The act of congress does not, necessarily, extend to every

1 Br. 437.

object comprehended in the state law, but neither its terms, nor the constitution, will permit it to be extended farther than the state law.

The first section of the act "to prevent the migration of free negroes and mulattoes" into this commonwealth prohibits their coming voluntarily, or being imported. The second section imposes a penalty on any master of a vessel who shall bring any free negro or mulatto. The third section provides that "the act shall not extend to any masters of vessels who shall bring into this state any free negro or mulatto employed on board and belonging to such vessel, and who shall therewith depart." The act, then, does not prohibit the master of a vessel, navigated by free negroes or mulattoes, from coming into port, and setting only part of his crew on shore, provided they depart with the vessel. The state prohibition, then, does not commence, until the vessel departs without the negro or mulatto seaman. No probability, however strong, that the vessel will depart without the seaman, can extend the act to such a case, until the vessel has actually departed. If this be true, neither does the act of congress extend to such a case.

But this is not all. The act of assembly prohibits the admission of free negroes and mulattoes only, not of other persons of color. Other persons of color were admissible into Virginia.

The act of congress makes a clear distinction between free negroes and mulattoes, and other persons of color. But so much of the act of congress as respects other persons of color does not apply to Virginia, because such persons were admissible into this state.

The libel charges the sailors landed to have been persons of color, not negroes or mulattoes. If, under this libel, it were allowable to prove that the sailors landed were, in fact, negroes or mulattoes, it is not proved. Mr. Bush does not prove that any were landed but says that those discharged were "of different colors and nations." Andrew Johnson says, "that, on

1 Br. 438.

the twenty-ninth of October, the people of color received their prize tickets, went on shore, and, of course, took their own discharge."

There is, then, no evidence that these people were negroes or mulattoes. Upon these grounds, I am of opinion that no forfeiture of the vessel has been incurred, and that so much of the sentence as condemns the Brig Wilson ought to be reversed, and restitution awarded.

1 Br. 439.

THE UNITED STATES v. MAURICE AND OTHERS.

C. C. DISTR. VA. AND N. C., MAY TERM, 1823.

[2 Brockenbrough's Reports, 96–118.]

The following opinion, as delivered by Chief Justice Marshall, contains a full narrative of the facts and pleadings in the cause:—

This is an action of debt brought upon a bond executed on the 18th day of August, 1818, in the penalty of twenty thousand dollars, with the following condition: "Whereas the said James Maurice has been appointed agent for fortifications on the part of the United States, now, therefore, if the said James Maurice shall truly and faithfully execute and discharge all the duties appertaining to the said office of agent, as aforesaid, then the above obligation to be void," &c. The breach assigned in the declaration is, that large sums of money came to the hands of the said Maurice, as agent of fortifications, which he was bound, by the duties of his office, faithfully to disburse and account for, a part of which, namely, forty thousand dollars, he has, in violation of his said duty, utterly failed to disburse to the use of the United States, or account for; wherefore, &c.

The defendants, the sureties in the said obligation, prayed oyer of the bond, and of the condition, and then demurred to the declaration. The plaintiff joined in the demurrer.

The defendants also pleaded several pleas, on some of which issue has been made up, and on others demurrer has been joined.

The first point to be considered is the demurrer to the declaration.

The defendants insist that the declaration cannot be sus-

tained, because the bond is void in law, it being taken for the performance of duties of an office, which office has no legal existence, and, consequently, no legal duties. No violation of duty, it is said, can take place, when no duty exists.

Since the demurrer admits all the facts alleged in the declaration which are properly charged, and denies that those facts create any obligation in law, it must be taken as true that James Maurice was in fact appointed an agent of fortification on the part of the United States: that he received large sums of money in virtue of that appointment, and has failed to apply it to the purpose for which he received it, or to account for it to the United States.

As the securities certainly intended to undertake that Maurice should perform the very acts which he has failed to perform, and as the money of the nation has come into his hands on the faith of this undertaking, it is the duty of the court to hold them responsible, to the extent of this undertaking, unless the law shall plainly interpose its protecting power for their relief, upon the principle that the bond creates no legal obligation. Is this such a bond? The first step in this inquiry is, the character of the bond. Does it, on its face, purport to be a mere official bond, or to be in the nature of a contract? This question is to be answered by a reference to the terms in which its condition is expressed. These leave no shadow of doubt on the mind. The condition refers to no contract, states no undertaking to perform any specific act, refers to nothing, describes nothing which the obligor was bound to do, except to perform the duties of an officer. It recites that he was appointed to an office, and declares that the obligation is to be void if he "shall truly and faithfully execute and discharge all the duties appertaining to the said office." Of the nature of those duties no information whatever is given. Whether the disbursement of public money does or does not constitute a part of them is a subject on which the instrument is entirely silent.

The bond, then, is, on its face, completely an official bond,

given, not for the performance of any contract, but for the performance of the duties of an office, which duties were known, and had been prescribed by law, or by persons authorized to prescribe them.

In his declaration the attorney for the United States has necessarily taken up this idea, and proceeded on it. In his assignment of breaches he states that the said James Maurice had been appointed agent of fortifications, and alleges that he had not performed the duties of the said office, nor kept the condition of his bond, but that the said condition is broken in this, that, while he held and remained in the said office, divers large sums of money came to his hands, as agent of fortifications, which he was bound by the duties of his office faithfully to disburse and account for; a part of which, forty thousand dollars, he has, in violation of his said duty, utterly failed to disburse or account for. On this breach of his official duty, which is alleged to constitute a breach of the condition of his bond, the action is founded. No allusion is made to any other circumstance whatever, as giving cause of action.

The suit, then, is plainly prosecuted for a violation of the duty of office, which is alleged to constitute a breach of an official bond. The court must, on this demurrer, at least, so consider it, and must decide it according to those rules which govern cases of this description. This being a suit upon an official bond, the condition of which binds the obligors only that the officer should perform the duties of his office, it would seem that the obligation could be only co-extensive with these duties. What is their extent? The defendants contend that no such office exists; that James Maurice was never an officer, and, of consequence, was never bound by this bond to the performance of any duty whatever.

To estimate the weight of this objection, it becomes necessary to examine the constitution of the United States, and the acts of congress in relation to this subject.

The constitution (article 2, section 2) declares that the president "shall nominate, and, by and with the advice and consent

of the senate, shall appoint, ambassadors," &c., "and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law."

I feel no diminution of reverence for the framers of this sacred instrument, when I say that some ambiguity of expression has found its way into this clause. If the relative, "which," refers to the word "appointments," that word is referred to in a sense rather different from that in which it had been used. It is used to signify the act of placing a man in office, and referred to as signifying the office itself. Considering this relative as referring to the word "offices," which word, if not expressed, must be understood, it is not perfectly clear whether the words, "which" offices "shall be established by law," are to be construed as ordaining that all offices of the United States shall be established by law, or merely as limiting the previous general words to such offices as shall be established by law. Understood in the first sense, this clause makes a general provision that the president shall nominate, and, by and with the consent of the senate, appoint, to all offices of the United States, with such exceptions only as are made in the constitution: and that all offices (with the same exceptions) shall be established by law. Understood in the last sense, this general provision comprehends those offices only which might be established by law, leaving it in the power of the executive, or of those who might be entrusted with the execution of the laws, to create, in all cases of legislative omission, such offices as might be deemed necessary for their execution, and afterwards to fill those offices.

I do not know whether this question has ever occurred to the legislative or executive of the United States, nor how it may have been decided. In this ignorance of the course which may have been pursued by the government, I shall adopt the first interpretation, because I think it accords best with the general spirit of the constitution, which seems to have arranged the creation of office among legislative powers, and because, too, this construction is, I think, sustained by the subsequent

2 Br. 100.

words of the same clause, and by the third clause of the same section.

The sentence which follows, and forms an exception to the general provision which had been made, authorizes congress "by law to vest the appointment of such inferior officers as they think proper, in the president alone, in the courts of law, or in the heads of departments." This sentence, I think, indicates an opinion in the framers of the constitution that they had provided for all cases of offices.

The third section empowers the president "to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session."

This power is not confined to vacancies which may happen in offices created by law. If the convention supposed that the president might create an office, and fill it originally without the consent of the senate, that consent would not be required for filling up a vacancy in the same office.

The constitution, then, is understood to declare that all offices of the United States, except in cases where the constitution itself may otherwise provide, shall be established by law.

Has the office of agent of fortifications been established by law?

From the year 1794 to the year 1808 congress passed several acts empowering the president to erect fortifications, and appropriating large sums of money to enable him to carry these acts into execution. No system for their execution has ever been organized by law. The legislature seems to have left this subject to the discretion of the executive. The president was, consequently, at liberty to employ any means which the constitution and laws of the United States placed under his control. He might, it is presumed, employ detachments from the army, or he might execute the work by contract, in all the various forms which contracts can assume. Might he organize a corps, consisting of laborers, managers, paymasters, providers, &c., with distinct departments of duty, prescribed and defined

2 Br. 101.

by the executive, and with such fixed compensation as might be annexed to the various parts of the service? If this mode of executing the law be consistent with the constitution, there is nothing in the law itself to restrain the president from adopting it. But the general language of the law must be limited by the constitution, and must be construed to empower the president to employ those means only which are constitutional. According to the construction given in this opinion to the second section of the second article of that instrument, it directs that all offices of the United States shall be established by law; and I do not think that the mere direction that a thing shall be done, without prescribing the mode of doing it, can be fairly construed into the establishment of an office for the purpose, if the object can be effected without one. It is not necessary, or even a fair inference from such an act, that congress intended it should be executed through the medium of offices, since there are other ample means by which it may be executed, and since the practice of the government has been for the legislature, wherever this mode of executing an act was intended, to organize a system by law, and either to create the several laws expressly, or to authorize the president, in terms, to employ such persons as he might think proper, for the performance of particular services.

If, then, the agent of fortifications be an officer of the United States, in the sense in which that term is used in the constitution, his office ought to be established by law, and cannot be considered as having been established by the acts empowering the president, generally, to cause fortifications to be constructed.

Is the agent of fortifications an officer of the United States? An office is defined to be "a public charge or employment," and he who performs the duties of the office is an officer. If employed on the part of the United States, he is an officer of the United States. Although an office is "an employment," it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied,

to do an act, or perform a service, without becoming an officer. But if a duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, which an individual is appointed by government to perform, who enters on the duties appertaining to his station without any contract defining them, if those duties continue, though the person be changed,—it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer.

If it may be converted into a contract, it must be a contract to perform the duties of the office of agent of fortifications, and such an office must exist with ascertained duties, or there is no standard by which the extent of the condition can be measured.

The army regulations are referred to in acts of congress passed previous and subsequent to the execution of the bond under consideration. A copy of those regulations, purporting to be a revisal made in the war office, in September, 1816, conformably to the act of the 24th of April, 1816, has been laid before the court, and referred to by both parties. These regulations provide for the appointment and define the duties of the agents of fortifications.

They are to be governed by the orders of the engineer department, in the disbursement of the money placed in their hands. They are to provide the materials and workmen deemed necessary for the fortifications; and they are to pay the laborers employed. In the performance of these duties, they are directed to make out, first, an "abstract of articles purchased;" secondly, "an abstract of labor performed;" thirdly, "an abstract of pay of mechanics;" and fourthly, "an abstract of contingent expenses."

These duties are those of a purchasing quartermaster, commissary, and paymaster. These are important duties. A very superficial examination of the laws will be sufficient to show that duties of this description, if not performed by contract, are performed by persons who are considered as officers of the United States, whose offices are established by law.

2 Br. 103.

If, then, we look at the bond and declaration, we find in both every characteristic of an office bond. If we look at the army regulations, the only additional source of information within our reach, we find the duties of an agent of fortifications to be such as would make him an officer of the United States. Is the office established by law? The permanent agents mentioned in the act of March 3d, 1809, (chapter 19, section 3,) are those who are appointed, "either for the purpose of making contracts, or for the purchase of supplies, or for the disbursement, in any other manner, of moneys, for the use of the military establishment of the United States." If this act authorizes the appointment of such agents, and virtually establishes their offices, it cannot, I think, in correct construction, be extended to other persons than those who are employed in some manner in disbursing money "for the use of the military establishment or navy of the United States." "The military establishment" is a term which seems to be well defined in the acts of congress, and to be well understood, and I do not think the act can be construed to comprehend an agent of fortifications.

In the act of March 3d, 1817, (chapter 517, section 5,) it is made the duty of the secretary of war "to prepare general regulations, better defining and prescribing the respective duties and powers in the adjutant-general, inspector-general, quartermaster-general, and commissary of ordnance, department of the topographical engineers, of the aids of generals, and, generally, of the general and regimental staff; which regulations, when approved by the president of the United States, shall be respected and obeyed, until altered or revoked by the same authority."

The exclusive object of this section is, I think, the regulation of existing offices. I do not think it can be fairly construed to extend to the establishment of offices. Yet if, under this act, subordinate agencies or offices have in fact been introduced, such offices may be established by subsequent acts of congress.

The act of April 24th, 1816, "for organizing the general staff, and making farther provision for the army of the United States." section 9, enacts "that the regulations, in force before the reduc-

tion of the army, be recognized, as far as the same shall be found applicable to the service, subject, however, to such alterations as the secretary of war may adopt, with the approbation of the president."

A legislative recognition of the actually existing regulations of the army must be understood as giving to those regulations the sanction of the law; and the subsequent words of the sentence authorize the secretary of war to alter those regulations with the approbation of the president. Such alterations have also the sanction of the act of 1816.

This subject appears to have been taken up by the secretary. A pamphlet, entitled "Army Regulations, revised, conformably to the Act of 24th of April, 1816," has been laid before the court as authentic, and has been appealed to by both plaintiff and defendants, as being the same regulations which are approved and adopted by the act of the 2d of March, 1821, section 13.

These regulations direct the appointment of agents of fortifications, and define their duties. They purport to have been revised in the war office, in September, 1816. If the provision they contain respecting agents of fortifications formed a part of the army regulations prior to the act of the 24th of April, 1816, it is recognized by that act. If that provision was first introduced in September, 1816, it may, if approved by the president, be considered as an alteration authorized by that act. The question, whether this alteration has been approved by the president, is, perhaps, a question of fact, not examinable on this demurrer.

When I consider the act of the 24th of April, 1816, and this revisal in the war office, in connexion with the act of the 2d of March, 1821, adopting the revisal of September, 1816, under the name of General Regulations of the Army, compiled by Major General Scott, (for they are represented as being the same regulations,) I feel much difficulty in saying that the office of agent of fortifications was not established by law when this bond was executed. I am more inclined to give this opinion, because I am

2 Br. 105.

persuaded this cause must be carried before a tribunal which can make that certain which was before uncertain; and because, by overruling the demurrer to the declaration, the other questions of law which occur in the cause, and which would be arrested by sustaining the demurrer to the declaration, will all be brought before the supreme court.

The defendants pleaded several pleas to the declaration. The second plea is, that the defendant, James Maurice, performed the condition of his bond up to the 26th day of September, 1820, on which day a new bond was executed, in pursuance of the act of the 15th of May, 1820, "providing for the better organization of the treasury department." The plaintiff takes issue on that part of the plea which alleges performance up to the 26th day of September, 1820, and demurs to the residue. The act, under which this new bond was executed, gives a new and summary remedy against officers of the United States who had received public money for which they had failed to account, and against their sureties, and contains a proviso: "That the summary process herein directed shall not affect any surety of any officer of the United States who became bound to the United States before the passing of this act; but each and every such officer shall, on or before the thirtieth day of September next, give new and sufficient sureties for the performance of the duties required of such officer." The defendants contend that this new and sufficient bond was a substitute for the old one, and discharged the sureties to the original obligation, so far as respects subsequent transactions.

The plaintiff contends that the bond is cumulative, and that the sureties to the first obligation continue bound for any subsequent as well as any preceding default of the officer.

There is certainly no express declaration of the act on this subject; and if the second bond operates a discharge of the first, this effect is produced by implication only; yet the implication is very strong in favor of the construction.

The sole object of the law is to obtain sureties against whom the new and summary remedy it gives might be used. To ob-

2 Br. 106.

tain additional security does not appear to be one of the motives for which it was passed. The direction, that the sureties should be "new" and "sufficient," countenances the opinion that they were solely relied on for the subsequent transactions of the officer. If no additional security was intended to be demanded; if the sole object of the law was to coerce the giving of sureties against whom this new remedy, by distress, might be used, it seems reasonable to think that the legislature supposed the new sureties alone responsible for the subsequent conduct of their officer. It could not escape the consideration of the legislature, that the same friends, who became bound in the first bond, might, probably, become bound in the second, thinking themselves discharged from the first. But friends may be willing to become bound in a penalty within their resources, or to an amount to which the officer can secure them, and very unwilling to become bound in double that sum. The officer may be able to give security in a penalty of twenty-five thousand dollars, and totally unable to give security for fifty thousand dollars. The government fixes the penalty in which an officer shall give bond and sureties, and is regulated, in fixing that penalty, by all the considerations which belong to the subject. It ought not to be considered as augmenting that penalty, unless the means used for augmenting it are plain, direct, and intelligible. In this case, if the same sureties execute the new bond, they are liable to a double penalty, by an act not clearly understood to have that effect. If there are new sureties to the new bond, the attention of the old sureties may be diverted from watching the conduct of the officer, and they may even be induced to relinquish liens on property, in order to enable the officer to find his new sureties.

If the course of legislation on the subject has been such as to furnish to the original sureties reasonable ground for the opinion that they were discharged from all liability for the subsequent conduct of the officer, and reasonable ground for the implication that such was the intention of the legislature, and I think it has, such ought to be the construction of the act. This demurrer, therefore, is overruled.

2 Br. 107.

The fifth plea is, that James Maurice was never legally appointed, but was, on the first day of August, 1818, appointed, by the secretary of war, agent of fortifications for Norfolk, Hampton Roads, and the lower part of the Chesapeake Bay, without any provisions of law whatever, authorizing and empowering him to make such appointment, and directly contrary to an act entitled an act &c., passed the 3d of March, 1809.

To this plea there is a demurrer.

The first question arising on this demurrer respects the validity of this appointment made by the secretary of war. It is too clear, I think, for controversy, that appointments to office can be made by heads of departments in those cases only which congress has authorized by law; and I know of no law which has authorized the secretary of war to make this appointment. There is certainly no statute which directly and expressly confers the power; and the army regulations, which are exhibited as having been adopted by congress, in the act of the 2d of March, 1821, declares that agents shall be appointed, but not that they shall be appointed by the secretary of war. If this mode of appointment formed a part of the regulations previous to the revision of September, 1816, that is a fact which might or might not be noticed, if averred in the pleadings. The court is not informed of its existence by this demurrer. It must, therefore, be supposed not to exist, and James Maurice cannot be considered as a regularly appointed agent of fortifications.

This brings us to the question in the cause on which I have felt, and still continue to feel, great difficulty. The appointment of James Maurice having been irregular, is this bond absolutely void ? or may it be sustained as a contract, entered into by a person not legally an officer, to perform certain duties belonging to an office ? If the office had no existence, it has been already stated, that a bond to perform its duties, generally, could create no obligation; but since the office does exist, the condition refers to something certain, by which the nature and extent of the undertaking of the obligor may be determined. It is an undertaking that James Maurice shall perform the duties ap-

pertaining to the office of agent of fortifications; and this undertaking is in the nature of contract. If this contract does not bind the parties according to its expressed extent, its failure must be ascribed to some legal defect or vice inherent in the instrument. It is contended that the bond is void because there is an inability on the part of the United States to make any contract not previously directed by statute.

The United States is a government, and, consequently, a body politic and corporate, capable of attaining the objects for which it was created, by the means which are necessary for their attainment. This great corporation was ordained and established by the American people, and endowed by them with great powers for important purposes. Its powers are, unquestionably, limited; but while within those limits, it is a perfect government as any other, having all the faculties and properties belonging to a government, with a perfect right to use them freely in order to accomplish the objects of its institutions. It will certainly require no argument to prove that one of the means, by which some of these objects are to be accomplished, is contract; the government, therefore, is capable of contracting, and its contracts may be made in the name of the United States.

The government acts by its agents; but it is neither usual nor necessary to express, in those contracts which merely acknowledge the obligation of an individual to the United States, the name of the agent who was employed in making it. His authority is acknowledged by the individual when he executes the contract, and is acknowledged by the United States when the government asserts any right under that contract. I do not mean to say that there exists any estopel on either party; I only mean to say that a contract executed by an individual, and received by the government, is prima facie evidence that it was entered into between proper parties. So with respect to the subject of the contract.

Without entering on the inquiry respecting the limits which may circumscribe the capacity of the United States to contract, I venture to say that it is co-extensive with the duties and pow-

2 Br. 109.

ers of government. Every contract which subserves to the performance of a duty may be rightfully made.

The constitution, which has vested the whole legislative powers of the union in congress, has declared that the president "shall take care that the laws be faithfully executed." The manner in which a law shall be executed does not always form a part of it; a power, not limited or regulated by the words of the acts, has been given by the legislature to the executive, to construct fortifications; and large sums of money have been appropriated to the object. It is not and cannot be denied, that these laws might have been carried into execution by means of contract; yet there is no act of congress expressly authorizing the executive to make any contract in the case. It is useless, and would be tedious, to multiply examples, but many might be given to illustrate the truth of the proposition. It follows, as a necessary consequence, that the duty, and, of course, the right, to make contracts, may flow from an act of congress which does not in terms prescribe this duty; the proposition, then, is true, that there is a power to contract in every case where it is necessary to the execution of a public duty.

It remains to inquire, whether it be indispensable to the validity of a contract, that it should express the circumstances under which it was made, so precisely and distinctly as to show the motives which induced it and the objects to be effected by it. This certainly is often done, and in many cases conduces to a clear understanding of the intention of the parties, and of the obligations which the instrument creates; but it is not universally practised, would be often inconvenient, and is necessary, I think, only so far as may be requisite to explain the nature of the contract. We know too well that persons entrusted with the public money are often defaulters. It is not, I believe, doubted, that the law raises an assumpsit to pay the money which the defaulter owes. An overpayment is sometimes made by mistake; is not the receiver liable to the United States? Yet there is no act of congress creating the assumpsit in either case. I presume it will not be denied, that a declaration charg-

ing that the defendant was indebted to the United States for money had and received to their use, and, that, being so indebted, he assumed and promised to pay it, would be sufficient without setting forth at large all the circumstances of the character in which, and the objects for which, the money was received. If the law would raise an implied assumpsit, which would be binding, I cannot conceive that an express assumpsit would be less so; nor can I conceive that such express assumpsit, more than the implied assumpsit, need detail the various circumstances on which its validity might depend. These would be matter of evidence. In any case where an assumpsit would be valid, the government may certainly take a bond, and I perceive no reasons why sureties may not also be demanded. It is the duty of the government to collect debts due to it, however they may have accrued; it results from this duty that the means of securing and collecting the public money may be used. Sureties may, therefore, be required to the bond demanded from the debtor; the instrument itself is an admission that it is given for a debt, and it is contrary to all our received opinions to require that it should show how the debt was contracted. Anything which destroys its validity may, undoubtedly, be shown in pleading; but a bond given to the United States is, I think, prima facie evidence of debt, and would be sustained on demurrer.

So if money be committed to the care of any person for a legitimate object, bond and security, on the same principle, may be required, with condition that he shall account for it. The jurisdiction of a limited court must, undoubtedly, appear on the record; but I do not think that the same rule applies to contracts. Infants, femes covert, idiots, and persons under duress, are not bound by their contracts. But their disability must be shown by pleading, and it need not appear in any contract that the parties to it are not liable to these disabilities. Every contract which is legal on its face, and imports a consideration, is supposed to be entered into on valid consideration, and to be obligatory, if the parties be ostensibly able, until the contrary is

2 Br. 112.

shown; and the same rule applies to a government which is capable of making contracts.

It is also contended that this bond is void, because it is entered into on a consideration which is either forbidden by express law, or contrary to the general policy of the law.

The plea refers to the act, passed on the 3d of March, 1809, "to amend the several acts for the establishment and regulation of the treasury, war, and navy departments." I have already said that I do not consider the prohibition of this act as comprehending agents of fortifications, because they do not belong to the military establishment, nor do their employments relate to it. It is unnecessary to enter into any argument in support of this opinion, because it is of no importance to the point under consideration. The effect, if the act applied to the office, would be to show that the appointment of James Maurice to the office of agent of fortifications was not legal; and that effect is produced by the construction I have given to the constitution. I consider the appointment of James Maurice to the office of agent of fortifications, by the secretary of war, as invalid; but the question, Is the bond void on that account? still remains to be considered. It was, undoubtedly, intended as an office bond, and was given in the confidence that James Maurice was legally appointed to office. If the suit was instituted to punish him for the neglect of duty, in the nature of non-user, or for any other failure, which could be attributed in any degree to the illegality of his appointment, I should be much disposed to think the plea a bar to the action. But this suit is brought to recover the money of the United States which came to the hands of James Maurice in virtue of his supposed office, and which he has neither applied to the purpose for which he received it, nor returned to the treasury. In such a case, neither James Maurice, nor those who undertook for him, can claim anything more than positive law affords them.

The plea does not controvert, but must be understood to confess, the material facts charged in the declaration. It must be understood to confess that the money of the United States came

to the hands of James Maurice as agent of fortifications; that it was the duty of such agent to disburse it for the use of the United States, in the manner prescribed by the army regulations, or to account for it; that he has failed to do either; and that they were bound for him in this respect. Admitting these things, they say it is a bar to the action brought for the money, that his appointment was illegal.

If the bond contained no reference to the appointment of James Maurice, as agent of fortifications; if its condition stated only that certain sums of money had been delivered to him, to be disbursed under the discretion of the principal engineer, in the purchase of materials for fortifications, and in the payment of laborers, its obligation, I presume, would not be questioned. It would be a contract which the United States might lawfully make. If, instead of specifying the particular purposes for which the money was received, the condition of a bond refers to a paper which does specify those purposes, I know of no principle of reason or of law, which varies the obligation of the instrument from what it would be if containing that specification within itself. That is certain which may be rendered certain; and an undertaking to perform the duties prescribed in a distinct contract, or in a law, or in any other known paper prescribing those duties, is equivalent to an enumeration of those duties in the body of the contract itself.

This obligation is an undertaking to perform the duties appertaining to the office of agent of fortifications. Those duties were prescribed in the army regulations, and were such as any individual might lawfully undertake to perform. The plea does not allege that the thing to be done was unlawful, nor does it allege that the illegality of the appointment to office constituted any impediment to a performance of the condition of the bond. Were it even improper to disburse the money received in the manner intended by the contract, it could not be improper to return it. There can be nothing unlawful in the engagement to return it. The obligation to return it, as in every other case of money advanced by mistake, is one, which, independent of

all express contract, would be created by the law itself. So far as respects the receiver himself, he would be bound by law to return the money not disbursed; and if he would be so bound, why may not others be bound with him for his doing that which law and justice oblige him to do?

Admitting the appointment to be irregular, to be contrary to the law and its policy, what is to be the consequence of this irregularity? Does it absolve the person appointed from the legal and moral obligation of accounting for public money which has been placed in his hands in consequence of such appointment? Does it authorize him to apply money so received to his own use? If the policy of the law condemns such appointments, does it also condemn the repayment of moneys received under them? Had this subject been brought before the legislature, and the opinion been there entertained that such appointments were illegal, what would have been the probable course? The secretary of war might have been censured; an attempt might have been authorized to make him ultimately responsible for the money advanced under the illegal appointment; but is it credible that the bond would be declared void? Would this have been the policy of those who make the law? Let the course of congress in another case answer this question.

It is declared to be unlawful for any member of congress to be concerned in any contract made on the part of the United States, and all such contracts are declared to be void. What is the consequence of violating this law, and making a contract against its express provisions? A fine is imposed on the violator; but does he keep the money received under the contract? Far from it. The law directs that the money so received shall be forthwith repaid; and in case of refusal or delay, "every person so refusing or delaying, together with his surety or sureties, shall be forthwith prosecuted at law, for the recovery of any such sum or sums of money advanced as aforesaid." If, then, this appointment be contrary to the policy of the law, the repayment of the money under it is not, and a suit may, I think, be sustained, to coerce such repayment on the bond given for that purpose.

The cases cited by the defendants do not, I think, support the plea.

Collins v. *Blantern* (2 Wilson's Reports, 341) was a bond given, the consideration of which was illegal. It was to compound a prosecution for a criminal offence. It was to induce a witness not to appear and give testimony against a person charged with the commission of a crime. The court determined that the bond was void, and that the illegal consideration might be averred in the plea, though not appearing in the condition. It is only wonderful that this could ever have been doubted.

The case of *Paxton* v. *Popham*, (9 East's Reports, 408,) and the case of *Pole* v. *Harrobin*, reported in a note in page 416 of the same volume, are both cases in which bonds were given for the payment of money for the performance of an act which was contrary to law. These cases differ in principle from that at bar. The bond was not given to induce the illegal appointment, or for any purpose in itself unlawful. The appointment had been made; and the object of the bond was to secure the regular disbursement of, or otherwise accounting for, public money advanced for a lawful purpose. The bond was not, then, unlawful, though the appointment was.

The case of *Nares and Pepys* v. *Rolles* (14 East's Reports, 510) was a suit on a bond given by a collector and his sureties, for the due collection and payment to the receiver-general of certain duties assessed under an act of parliament. The duties were collected, but not paid to the receiver-general; in consequence of which the collector was displaced, and suit brought against one of the sureties in the bond. The defence was, that the duties were not in law demandable, and this defence was founded on an ambiguity in the language of the act. The argument turned chiefly on the words of the statute, but the counsel for the plaintiffs contended also, that, supposing the act not to impose the taxes, yet the bond would not be void, for such a security might well be taken, that the duties which were actually collected should not be lost, but might be preserved, to be paid over to those who should be found ultimately entitled to

receive the money. It was competent for him to enter into a bond to pay over voluntary payments made to him, although he might not have been able to enforce payment of the rates from those who might refuse.

In answer to this argument, it was said, that, unless the act gave authority to assess and collect the duties, he was no collector, and could not be subject to any obligation for not paying money over to the plaintiffs, in that character, which was obtained by extortion.

The court seemed inclined to this opinion, but determined that the taxes were imposed and assessed according to law, and therefore gave judgment for the plaintiffs.

The impression which may, at the first blush, be made by this case, will be effaced by an attentive consideration of it. If the money collected was not due by law, the plaintiffs could have no right to receive it, and had, consequently, no cause of action against the defendant. The money sued for was not their money, but the money of the individuals from whom it had been unlawfully collected. The bond to collect and pay over this money to the receiver-general was a bond to do an unlawful act. The contract would have been clearly against law. In giving his opinion on this subject, the chief justice said: "Looking at the condition of this bond, as it appears upon the record, I cannot say, that, if the rates were collected without any authority, the collector could be called upon to pay them over, because he would be answerable to the individuals from whom he had received the money, and would be entitled to retain it for his own indemnity."

The case at bar is, in principle, entirely different from that of *Nares and Pepys* v. *Rolles*. This is not money obtained illegally from others, and therefore returnable to them, but is the money of the United States, drawn out of the treasury. The person holding it is not entitled "to retain it for his own indemnity" against the claims of others, for there are no others who can claim it. The justice of the case requires, I think, very clearly, that the defendants should be liable to the extent of

2 Br. 117.

their undertaking, and I do not think the principles of law discharge them from it.

I am therefore of opinion that the demurrer to this plea ought to be sustained, and that judgment on it be rendered for the plaintiffs.

2 Br. 117.

APPENDIX.

APPENDIX.

HYLTON *v.* THE UNITED STATES.

FEBRUARY TERM, 1796.

[3 Dallas's Reports, 171–184.]

Congress, in 1794, laid a duty upon "carriages for the conveyance of persons." Hylton, the plaintiff, kept, after the passage of the law laying the above-named duty, a number of chariots for his own use, but refused to pay duty on them, saying the law was unconstitutional. He was sued by the United States, in the circuit court for the district of Virginia, and the facts were submitted. The court being equally divided, the defendant confessed judgment, and took out his writ of error to the supreme court. The sole question was as to the constitutionality of the law taxing carriages, and the whole ground of argument gone over by the judges in their opinions, delivered *seriatim*, as follows :—

Chase, J. By the case stated, only one question is submitted to the opinion of this court : Whether the law of congress, of the 5th of June, 1794, entitled "An Act to lay Duties upon Carriages for the Conveyance of Persons," is unconstitutional and void ?

The principles laid down, to prove the above law void, are these : That a tax on carriages is a direct tax, and, therefore,

3 Dal. 172.

by the constitution, must be laid according to the census directed by the constitution to be taken, to ascertain the number of representatives from each state; and that the tax in question, on carriages, is not laid by that rule of apportionment, but by the rule of uniformity, prescribed by the constitution in the case of duties, imposts, and excises; and a tax on carriages is not within either of those descriptions.

By the second section of the first article of the constitution it is provided that direct taxes shall be apportioned among the several states according to their numbers, to be determined by the rule prescribed.

By the ninth section of the same article it is further provided that no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration before directed.

By the eighth section of the same article it was declared that congress shall have power to lay and collect taxes, duties, imposts, and excises; but all duties, imposts, and excises shall be uniform throughout the United States.

As it was incumbent on the plaintiff's counsel in error, so they took great pains, to prove that the tax on carriages was a direct tax; but they did not satisfy my mind. I think, at least, it may be doubted; and if I only doubted, I should affirm the judgment of the circuit court. The deliberate decision of the national legislature (who did not consider a tax on carriages a direct tax, but thought it was within the description of a duty) would determine me, if the case was doubtful, to receive the construction of the legislature; but I am inclined to think that a tax on carriages is not a direct tax, within the letter or meaning of the constitution.

The great object of the constitution was to give congress a power to lay taxes adequate to the exigencies of government; but they were to observe two rules in imposing them, namely, the rule of uniformity, when they laid duties, imposts, or excises; and the rule of apportionment according to the census, when they laid any direct tax.

If there are any other species of taxes that are not direct, and

3 Dal. 173.

not included within the words "duties, imposts, or excises," they may be laid by the rule of uniformity, or not, as congress shall think proper and reasonable. If the framers of the constitution did not contemplate other taxes than direct taxes, and duties, imposts, and excises, there is great inaccuracy in their language. If these four species of taxes were all that were meditated, the general power to lay taxes was unnecessary. If it was intended that congress should have authority to lay only one of the four above enumerated, to wit, direct taxes by the rule of apportionment, and the other three by the rule of uniformity, the expressions would have run thus: "Congress shall have power to lay and collect direct taxes, and duties, imposts, and excises; the first shall be laid according to the census; and the three last shall be uniform throughout the United States." The power, in the eighth section of the first article, to lay and collect taxes, included a power to lay direct taxes, (whether capitation, or any other,) and also duties, imposts, and excises; and every other species or kind of tax whatsoever, and called by any other name. Duties, imposts, and excises were enumerated, after the general term "taxes," only for the purpose of declaring that they were to be laid by the rule of uniformity. I consider the constitution to stand in this manner. A general power is given to congress to lay and collect taxes, of every kind or nature, without any restraint, except only on exports; but two rules are prescribed for their government, namely, uniformity and apportionment; three kinds of taxes, to wit, duties, imposts, and excises, by the first rule, and capitation or other direct taxes, by the second rule.

I believe some taxes may be both direct and indirect at the same time. If so, would congress be prohibited from laying such a tax, because it is partly a direct tax?

The constitution evidently contemplated no taxes as direct taxes, but only such as congress could lay in proportion to the census. The rule of apportionment is only to be adopted in such cases where it can reasonably apply; and the subject taxed must ever determine the application of the rule.

3 Dal. 174.

If it is proposed to tax any specific article by the rule of apportionment, and it would evidently create great inequality and injustice, it is unreasonable to say that the constitution intended such tax should be laid by that rule.

It appears to me that a tax on carriages cannot be laid by the rule of apportionment, without very great inequality and injustice. For example; suppose two states, equal in census, to pay eighty thousand dollars each, by a tax on carriages, of eight dollars on every carriage; and in one state there are one hundred carriages, and in the other one thousand. The owners of carriages in one state would pay ten times the tax of owners in the other. A, in one state, would pay for his carriage eight dollars; but B, in the other state, would pay for his carriage eighty dollars.

It was argued that a tax on carriages was a direct tax, and might be laid according to the rule of apportionment, and, as I understood, in this manner: Congress, after determining on the gross sum to be raised, was to apportion it according to the census, and then lay it in one state on carriages, in another on horses, in a third on tobacco, in a fourth on rice, and so on. I admit that this mode might be adopted, to raise a certain sum in each state according to the census, but it would not be a tax on carriages, but on a number of specific articles; and it seems to me that it would be liable to the same objection of abuse and oppression as a selection of any one article in all the states.

I think an annual tax on carriages for the conveyance of persons may be considered as within the power granted to congress to lay duties. The term "duty" is the most comprehensive next to the generical term "tax;" and, practically, in Great Britain, whence we take our general ideas of taxes, duties, imposts, excises, customs, &c., embraces taxes on stamps, tolls for passage, &c., &c., and is not confined to taxes on importation only.

It seems to me that a tax on expense is an indirect tax; and I think an annual tax on a carriage for the conveyance of persons is of that kind; because a carriage is a consumable commodity; and such annual tax on it is on the expense of the owner.

3 Dal. 174.

I am inclined to think, but of this I do not give a judicial opinion, that the direct taxes contemplated by the constitution are only two, to wit, a capitation or poll tax, simply, without regard to property, profession, or any other circumstance; and a tax on land. I doubt whether a tax, by a general assessment of personal property within the United States, is included within the term "direct tax."

As I do not think the tax on carriages is a direct tax, it is unnecessary, at this time, for me to determine whether this court constitutionally possesses the power to declare an act of congress void, on the ground of its being made contrary to, and in violation of, the constitution; but if the court have such power, I am free to declare that I will never exercise it, but in a very clear case.

I am for affirming the judgment of the circuit court.

Paterson, J.—By the second section of the first article of the constitution of the United States it is ordained that representatives and direct taxes shall be apportioned among the states according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and including Indians not taxed, three-fifths of all other persons.

The eighth section of the said article declares that congress shall have power to lay and collect taxes, duties, imposts, and excises; but all duties, imposts, and excises shall be uniform throughout the United States.

The ninth section of the same article provides that no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration before directed to be taken.

Congress passed a law, on the 5th of June, 1794, entitled, "An Act laying Duties upon Carriages for the Conveyance of Persons."

Daniel Lawrence Hylton, on the 5th of June, 1794, and therefrom to the last day of September next following, owned, possessed, and kept one hundred and twenty-five chariots for the

3 Dal. 175.

conveyance of persons, but exclusively for his own separate use, and not to let out to hire, or for the conveyance of persons for hire.

The question is, whether a tax upon carriages be a direct tax? If it be a direct tax, it is unconstitutional, because it has been laid pursuant to the rule of uniformity, and not to the rule of apportionment. In behalf of the plaintiff in error it has been urged that a tax on carriages does not come within the description of a duty, impost, or excise, and, therefore, is a direct tax. It has, on the other hand, been contended, that, as a tax on carriages is not a direct tax, it must fall within one of the classifications just enumerated, and, particularly, must be a duty or excise. The argument on both sides turns in a circle; it is not a duty, impost, or excise, and therefore must be a direct tax; it is not a direct tax, and therefore must be a duty or excise. What is the natural and common, or technical and appropriate meaning of the words, "duty," and "excise," it is not easy to ascertain. They present no clear and precise idea to the mind. Different persons will annex different significations to the terms. It was, however, obviously the intention of the framers of the constitution that congress should possess full power over every species of taxable property, except exports. The term "taxes" is generical, and was made use of to vest in congress plenary authority in all cases of taxation. The general division of taxes is into direct and indirect. Although the latter term is not to be found in the constitution, yet the former necessarily implies it. Indirect stands opposed to direct. There may, perhaps, be an indirect tax on a particular article that cannot be comprehended within the description of duties, or imposts, or excises; in such case it will be comprised under the general denomination of "taxes." For the term "tax" is the genus, and includes,—

1. Direct taxes.

2. Duties, imposts, and excises.

3. All other classes of an indirect kind, and not within any of the classifications enumerated under the preceding heads.

The question occurs, How is such tax to be laid? uniformly,

or apportionately? The rule of uniformity will apply, because it is an indirect tax, and direct taxes only are to be apportioned. What are direct taxes within the meaning of the constitution? The constitution declares that a capitation tax is a direct tax; and, both in theory and practice, a tax on land is deemed to be a direct tax. In this way, the terms "direct taxes," and "capitation and other direct tax," are satisfied. It is not necessary to determine whether a tax on the product of land be a direct or indirect tax. Perhaps the immediate product of land, in its original and crude state, ought to be considered as the land itself; it makes part of it; or else the provision made against taxing exports would be easily eluded. Land, independently of its produce, is of no value. When the produced is converted into a manufacture, it assumes a new shape; its nature is altered; its original state is changed; it becomes quite another subject, and will be differently considered. Whether direct taxes, in the sense of the constitution, comprehend any other tax than a capitation tax, and tax on land, is a questionable point. If congress, for instance, should tax, in the aggregate or mass, things that generally pervade all the states in the union, then, perhaps, the rule of apportionment would be the most proper, especially if an assessment was to intervene. This appears by the practice of some of the states to have been considered as a direct tax. Whether it be so under the constitution of the United States is a matter of some difficulty; but as it is not before the court, it would be improper to give any decisive opinion upon it. I never entertained a doubt that the principal, I will not say the only, objects that the framers of the constitution contemplated, as falling within the rule of apportionment, were a capitation tax and a tax on land. Local considerations, and the particular circumstances and relative situation of the states, naturally lead to this view of the subject. The provision was made in favor of the southern states. They possessed a large number of slaves; they had extensive tracts of territory, thinly settled, and not very productive. A majority of the states had but few slaves, and several of them a limited terri-

3 Dal. 177.

tory, well settled, and in a high state of cultivation. The southern states, if no provision had been introduced in the constitution, would have been wholly at the mercy of the other states. Congress in such case might tax slaves at discretion or arbitrarily, and land in every part of the union after the same rate or measure: so much a head in the first instance, and so much an acre in the second. To guard them against imposition in these particulars was the reason of introducing the clause in the constitution which directs that representatives and direct taxes shall be apportioned among the states according to their respective numbers.

On the part of the plaintiff in error it has been contended that the rule of apportionment is to be favored rather than the rule of uniformity; and, of course, that the instrument is to receive such a construction as will extend the former and restrict the latter. I am not of that opinion. The constitution has been considered as an accommodating system; it was the effect of mutual sacrifices and concession; it was the work of compromise. The rule of apportionment is of this nature; it is radically wrong; it cannot be supported by any solid reasoning. Why should slaves, who are a species of property, be represented, more than any other property? The rule, therefore, ought not to be extended by construction.

Again, numbers do not afford a just estimate or rule of wealth. It is, indeed, a very uncertain and incompetent sign of opulence. There is another reason against the extension of the principle laid down in the constitution.

The counsel on the part of the plaintiff in error have further urged that an equal participation of the expense or burden by the several states in the union was the primary object which the framers of the constitution had in view; and that this object will be effected by the principle of apportionment, which is an operation upon states, and not on individuals; for each state will be debited for the amount of its quota of the tax, and credited for its payments. This brings it to the old system of requisitions. An equal rule is doubtless the best. But how is

this to be applied? to states or to individuals? The latter are the objects of taxation, without reference to states, except in the case of direct taxes. The fiscal power is exerted certainly, equally, and effectually on individuals; it cannot be exerted on states. The history of the United Netherlands, and of our own country, will evince the truth of this position. The government of the United States could not go on under the confederation, because congress were obliged to proceed in the line of requisition. Congress could not, under the old confederation, raise money by taxes, be the public exigencies ever so pressing and great. They had no coercive authority; if they had, it must have been exercised against the delinquent states, which would be ineffectual, or terminate in a separation. Requisitions were a dead letter, unless the state legislatures could be brought into action; and when they were, the sums raised were very disproportional. Unequal contributions or payments engendered discontent, and fomented state jealousy. Whenever it shall be thought necessary or expedient to lay a direct tax on land, where the object is one and the same, it is to be apprehended that it will be a fund not much more productive than that of requisition under the former government. Let us put the case. A given sum is to be raised from the landed property in the United States. It is easy to apportion this sum, or to assign to each state its quota. The constitution gives the rule. Suppose the proportion of North Carolina to be eighty thousand dollars. This sum is to be laid on the landed property in the state; but by what rule, and by whom? Shall every acre pay the same sum, without regard to its quality, value, situation, or productiveness? This would be manifestly unjust. Do the laws of the different states furnish sufficient data for the purpose of forming one common rule, comprehending the quality, situation, and value of the lands? In some of the states there has been no land tax for several years; and where there has been, the mode of laying the tax is so various, and the diversity in the land is so great, that no common principle can be deduced and carried into practice. Do the laws of each state furnish

3 Dal. 178.

data from whence to extract a rule whose operation shall be equal and certain in the same state? Even this is doubtful. Besides, subdivisions will be necessary; the apportionment of the state, and, perhaps, of a particular part of the state, is again to be apportioned among counties, townships, parishes, or districts. If the lands be classed, then a specific value must be annexed to each class. And there a question arises, How often are classifications and assessments to be made? Annually, triennially, septennially? The oftener they are made, the greater will be the expense; and the seldomer they are made, the greater will be the inequality and injustice. In the process of the operation a number of persons will be necessary to class, to value, and assess the land; and after all the guards and provisions that can be devised, we must ultimately rely upon the discretion of the officers in the exercise of their functions. Tribunals of appeal must also be instituted to hear and decide upon unjust valuations, or the assessors will act *ad libitum*, without check or control. The work, it is to be feared, will be operose and unproductive, and full of inequality, injustice, and oppression. Let us, however, hope that a system of land taxation may be so corrected and matured by practice as to become easy and equal in its operation, and productive and beneficial in its effects. But to return. A tax on carriages, if apportioned, would be oppressive and pernicious. How would it work? In some states there are many carriages, and in others but few. Shall the whole sum fall on one or two individuals in a state, who may happen to own and possess carriages? The thing would be absurd and inequitable. In answer to this objection, it has been observed that the sum, and not the tax, is to be apportioned; and that congress may select in the different states different articles or objects from whence to raise the apportioned sum. The idea is novel. What, shall land be taxed in one state, slaves in another, carriages in a third, and horses in a fourth; or shall several of these be thrown together, in order to levy and make the quotaed sum? The scheme is fanciful. It would not work well, and, perhaps, is utterly impracticable.

3 Dal. 179.

It is easy to discern that great, and, perhaps, insurmountable, obstacles must arise in forming the subordinate arrangements necessary to carry the system into effect; when formed, the operation would be slow and expensive, unequal and unjust. If a tax upon land, where the object is simple and uniform throughout the states, is scarcely practicable, what shall we say of a tax attempted to be apportioned among, and raised and collected from, a number of dissimilar objects? The difficulty will increase with the number and variety of the things proposed for taxation. We shall be obliged to resort to intricate and endless valuations and assessments, in which everything will be arbitrary, and nothing certain. There will be no rule to walk by. The rule of uniformity, on the contrary, implies certainty, and leaves nothing to the will and pleasure of the assessor. In such case, the object and the sum coincide, the rule and the thing unite, and, of course, there can be no imposition. The truth is, that the articles taxed in one state should be taxed in another; in this way the spirit of jealousy is appeased, and tranquillity preserved; in this way, the pressure on industry will be equal in the several states, and the relation between the different subjects of taxation duly preserved. Apportionment is an operation on states, and involves valuations and assessments, which are arbitrary, and should not be resorted to but in case of necessity. Uniformity is an instant operation on individuals, without the intervention of assessments, or any regard to states, and is at once easy, certain, and efficacious. All taxes on expenses or consumption are indirect taxes. A tax on carriages is of this kind, and of course is not a direct tax. Indirect taxes are circuitous modes of reaching the revenue of individuals, who generally live according to their income. In many cases of this nature the individual may be said to tax himself. I shall close the discourse with reading a passage or two from Smith's *Wealth of Nations.*

"The impossibility of taxing people in proportion to their revenue, by any capitation, seems to have given occasion to the invention of taxes upon consumable commodities; the state, not

3 Dal. 180.

knowing how to tax directly and proportionably the revenue of its subjects, endeavors to tax it indirectly by taxing their expense, which it is supposed in most cases will be nearly in proportion to their revenue. Their expense is taxed by taxing the consumable commodities upon which it is laid out." Vol. iii, page 331.

"Consumable commodities, whether necessaries or luxuries, may be taxed in two different ways; the consumer may either pay an annual sum on account of his using or consuming goods of a certain kind, or the goods may be taxed while they remain in the hands of the dealer, and before they are delivered to the consumer. The consumable goods which last a considerable time before they are consumed altogether are most properly taxed in the one way; those of which the consumption is immediate, or more speedy, in the other; the coach tax and plate tax are examples of the former method of imposing; the greater part of the other duties of excise and customs, of the latter." Vol. iii, page 341.

I am, therefore, of opinion that the judgment rendered in the circuit court of Virginia ought to be affirmed.

Iredell, J.—I agree in opinion with my brothers who have already expressed theirs, that the tax in question is agreeable to the constitution; and the reasons which have satisfied me can be delivered in a very few words, since I think the constitution itself affords a clear guide to decide the controversy.

The congress possess the power of taxing all taxable objects, without limitation, with the particular exception of a duty on exports.

There are two restrictions only on the exercise of this authority :—

1. All direct taxes must be apportioned.

2. All duties, imposts, and excises must be uniform.

If the carriage tax be a direct tax, within the meaning of the constitution, it must be apportioned.

If it be a duty, impost, or excise, within the meaning of the constitution, it must be uniform.

If it can be considered as a tax, neither direct, within the meaning of the constitution, nor comprehended within the term "duty, impost," or "excise;" there is no provision in the constitution, one way or another; and then it must be left to such an operation of the power as if the authority to lay taxes had been given generally in all instances, without saying whether they should be apportioned or uniform; and in that case I should presume the tax ought to be uniform; because the present constitution was particularly intended to affect individuals, and not states, except in particular cases specified; and this is the leading distinction between the articles of confederation and the present constitution.

As all direct taxes must be apportioned, it is evident that the constitution contemplated none as direct but such as could be apportioned.

If this cannot be apportioned, it is, therefore, not a direct tax, in the sense of the constitution.

That this tax cannot be apportioned is evident. Suppose ten dollars contemplated as a tax on each chariot, or post-chaise, in the United States, and the number of both in all the United States be computed at one hundred and five, the number of representatives in congress.

This would produce in the whole one thousand and fifty dollars. The share of Virginia, being $\frac{19}{105}$ parts, would be one hundred and ninety dollars. The share of Connecticut, being $\frac{7}{105}$ parts, would be seventy dollars. Then suppose Virginia had fifty carriages, and Connecticut two. The share of Virginia being one hundred and ninety dollars, this must, of course, be collected from the owners of carriages, and there would, therefore, be collected from each carriage three dollars and eighty cents. The share of Connecticut being seventy dollars, each carriage would pay thirty-five dollars.

If any state had no carriages, there could be no apportionment at all. This mode is too manifestly absurd to be supported, and has not even been attempted in debate.

But two expedients have been proposed, of a very extraordinary nature, to evade the difficulty.

3 Dal. 181.

1. To raise the money, a tax on carriages would produce, not by laying a tax on each carriage uniformly, but by selecting different articles in different states, so that the amount paid in each state may be equal to the sum due upon a principle of apportionment. One state might pay by a tax on carriages, another by a tax on slaves, &c.

I should have thought this merely an exercise of ingenuity, if it had not been pressed with some earnestness; and as this was done by gentlemen of high respectability in their profession, it deserves a serious answer, though it is very difficult to give such a one.

1. This is not an apportionment of a tax on carriages, but of the money a tax on carriages might be supposed to produce, which is quite a different thing.

2. It admits that congress cannot lay a uniform tax on all carriages in the union, in any mode, but that they may on carriages in one or more states. They may, therefore, lay a tax on carriages in fourteen states, but not in the fifteenth.

3. If congress, according to this new decree, may select carriages as a proper object in one or more states, but omit them in others, I presume they may omit them in all, and select other articles.

Suppose, then, a tax on carriages would produce one hundred thousand dollars, and a tax on horses a like sum, and a hundred thousand dollars were to be apportioned according to that mode. Gentlemen might amuse themselves with calling this a tax on carriages, or a tax on horses, while not a single carriage, nor a single horse, was taxed throughout the union.

4. Such an arbitrary method of taxing different states differently is a suggestion altogether new, and would lead, if practised, to such dangerous consequences that it will require very powerful arguments to show that that method of taxing would be in any manner compatible with the constitution, with which at present I deem it utterly irreconcilable, it being altogether destructive of the notion of a common interest, upon which the very principles of the constitution are founded, so far as the condition of the United States will admit.

3 Dal. 182.

The second expedient proposed was that of taxing carriages, among other things, in a general assessment. This amounts to saying that congress may lay a tax on carriages, but that they may not do it unless they blend it with other subjects of taxation. For this no reason or authority has been given, and, in addition to other suggestions offered by the counsel on that side, affords an irrefragable proof, that, when positions plainly so untenable are offered to counteract the principle contended for by the opposite counsel, the principle itself is a right one; for no one can doubt, that, if better reasons could have been offered, they would not have escaped the sagacity and learning of the gentlemen who offered them.

There is no necessity or propriety in determining what is, or is not, a direct, or indirect, tax in all cases.

Some difficulties may occur which we do not at present foresee. Perhaps a direct tax, in the sense of the constitution, can mean nothing but a tax on something inseparably annexed to the soil; something capable of apportionment under all such circumstances.

A land or a poll tax may be considered of this description.

The latter is to be considered so particularly, under the present constitution, on account of the slaves in the southern states, who give a ratio in the representation in the proportion of three to five.

Either of these is capable of apportionment.

In regard to other articles there may possibly be considerable doubt.

It is sufficient, on the present occasion, for the court to be satisfied that this is not a direct tax contemplated by the constitution, in order to affirm the present judgment; since, if it cannot be apportioned, it must necessarily be uniform.

I am clearly of opinion this is not a direct tax, in the sense of the constitution, and, therefore, that the judgment ought to be affirmed.

Judgment affirmed.

3 Dal. 183.

CALDER AND WIFE v. BULL AND WIFE.

AUGUST TERM, 1798.

[3 Dallas's Reports, 386–401.]

As all the important facts in this case are stated in the opening of Judge Chase's opinion, no abstract is needed. The opinions of the court were given *seriatim*, as follows:—

Chase, J.—The decision of one question determines, in my opinion, the present dispute. I shall, therefore, state from the record no more of the case than I think necessary for the consideration of that question only.

The legislature of Connecticut, on the second Thursday of May, 1795, passed a resolution, or law, which, for the reasons assigned, set aside a decree of the court of probate for Hartford, on the 21st of March, 1793, which decree disapproved of the will of Normand Morrison (the grandson) made the 21st of August, 1779, and refused to record the said will; and granted a new hearing by the said court of probate, with liberty of appeal therefrom, in six months. A new hearing was had, in virtue of this resolution, or law, before the said court of probate, who, on the 27th of July, 1795, approved the said will, and ordered it to be recorded. At August, 1795, appeal was then had to the superior court at Hartford, who, at February term, 1796, affirmed the decree of the court of probate. Appeal was had to the supreme court of errors of Connecticut, who, in June, 1796, adjudged that there were no errors. More than eighteen months elapsed from the decree of the court of probate, (on the 1st of March, 1793,) and thereby Caleb Bull and wife were barred of

all right of appeal by a statute of Connecticut. There was no law of that state whereby a new hearing or trial before the said court of probate might be obtained. Calder and wife claim the premises in question, in right of his wife, as heiress of N. Morrison, physician; Bull and wife claim under the will of N. Morrison, the grandson.

The counsel for the plaintiffs in error contend that the said resolution or law of the legislature of Connecticut, granting a new hearing in the above case, is an ex post facto law, prohibited by the constitution of the United States; that any law of the federal government, or of any of the state governments, contrary to the constitution of the United States, is void; and that this court possesses the power to declare such law void.

It appears to me a self-evident proposition, that the several state legislatures retain all the powers of legislation, delegated to them by the state constitutions, which are not expressly taken away by the constitution of the United States. The establishing courts of justice, the appointment of judges, and the making regulations for the administration of justice, within each state, according to its laws, on all subjects not entrusted to the federal government, appears to me to be the peculiar and exclusive province and duty of the state legislatures. All the powers delegated by the people of the United States to the federal government are defined, and no constructive powers can be exercised by it; and all the powers that remain in the state governments are indefinite, except only in the constitution of Massachusetts.

The effect of the resolution or law of Connecticut above stated is to revise a decision of one of its inferior courts, called the court of probate for Hartford, and to direct a new hearing of the case by the same court of probate that passed the decree against the will of Normand Morrison. By the existing law of Connecticut a right to recover certain property had vested in Calder and wife, the appellants, in consequence of a decision of a court of justice; but, in virtue of a subsequent resolution or law, and the new hearing thereof, and the decision in consequence, this right to recover certain property was divested, and the right to the

property declared to be in Bull and wife, the appellees. The sole inquiry is, whether this resolution or law of Connecticut, having such operation, is an ex post facto law, within the prohibition of the federal constitution.

Whether the legislature of any of the states can revise and correct by law a decision of any of its courts of justice, although not prohibited by the constitution of the state, is a question of very great importance, and not necessary now to be determined; because the resolution or law in question does not go so far. I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the constitution, or fundamental law, of the state. The people of the United States erected their constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it. The nature and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free, republican governments, that no man should be compelled to do what the laws do not require; nor to refrain from acts which the laws permit. There are acts which the federal, or state legislature cannot do, without exceeding their authority. There are certain vital principles in our free, republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as, to authorize manifest injustice by positive law; or, to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the legislature, for I cannot call it a law, contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law, in governments established on express compact, and on republican principles, must be determined by the nature of the

3 Dal. 388.

power on which it is founded. A few instances will suffice to explain what I mean. A law that punishes a citizen for an innocent action, or, in other words, for an act which when done was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a judge in his own cause; or, a law that takes property from A and gives it to B;— it is against all reason and justice for a people to entrust a legislature with such powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit of our state governments amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them. The legislature may enjoin, permit, forbid, and punish; they may declare new crimes; and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime; or violate the right of an antecedent, lawful, private contract, or the right of private property. To maintain that our federal or state legislature possesses such powers, if they had not been expressly restrained, would, in my opinion, be a political heresy, altogether inadmissible in our free, republican governments.

All the restrictions contained in the constitution of the United States on the power of the state legislatures were provided in favor of the authority of the federal government. The prohibition against their making any ex post facto laws was introduced for greater caution, and very probably arose from the knowledge that the parliament of Great Britain claimed and exercised a power to pass such laws, under the denomination of bills of attainder, or bills of pains and penalties; the first inflicting capital, and the other less punishment. These acts were legislative judgments, and an exercise of judicial power. Sometimes they respected the crime, by declaring acts to be treason which were not treason when committed;* at other times they

*The case of the Earl of Strafford, in 1641.

2 Dal. 388.

violated the rules of evidence (to supply a deficiency of legal proof) by admitting one witness when the existing law required two; by receiving evidence without oath; or the oath of the wife against the husband; or other testimony, which the courts of justice would not admit;* at other times they inflicted punishments, where the party was not by law liable to any punishment;† and in other cases they inflicted greater punishment than the law annexed to the offence.‡ The ground for the exercise of such legislative power was this, that the safety of the kingdom depended on the death, or other punishment, of the offender; as if traitors, when discovered, could be so formidable, or the government so insecure! With very few exceptions, the advocates of such laws were stimulated by ambition, or personal resentment, and vindictive malice. To prevent such and similar acts of violence and injustice, I believe, the federal and state legislatures were prohibited from passing any bill of attainder, or any ex post facto law.

The constitution of the United States, article 1, section 9, prohibits the legislature of the United States from passing any ex post facto law; and, in section 10, lays several restrictions on the authority of the legislatures of the several states; and, among them, "that no state shall pass any ex post facto law."

It may be remembered that the legislatures of several of the states, to wit, Massachusetts, Pennsylvania, Delaware, Maryland, and North and South Carolina, are expressly prohibited, by their state constitutions, from passing any ex post facto law.

I shall endeavor to show what law is to be considered an ex post facto law, within the words and meaning of the prohibition in the federal constitution. The prohibition, "that no state shall pass any ex post facto law," necessarily requires some explana-

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* The case of Sir John Fenwick, in 1696.

† The banishment of Lord Clarendon, 1669, 19 Car. II., c. 10, and of the Bishop of Atterbury, in 1723, 9 Geo. I., c. 17.

‡ The Coventry act, 1670, 22 and 23 Car. II., c. 1.

tion; for, naked and without explanation, it is unintelligible, and means nothing. Literally, it is only that a law shall not be passed concerning and after the fact, or thing done, or action committed. I would ask, What fact, of what nature, or kind, and by whom done? That Charles I, king of England, was beheaded; that Oliver Cromwell was protector of England; that Louis XVI, late king of France, was guillotined; are all facts that have happened; but it would be nonsense to suppose that the states were prohibited from making any law after either of these events, and with reference thereto. The prohibition, in the letter, is not to pass any law concerning and after the fact; but the plain and obvious meaning and intention of the prohibition is this: that the legislatures of the several states shall not pass laws, after a fact done by a subject, or citizen, which shall have relation to such fact, and shall punish him for having done it. The prohibition considered in this light is an additional bulwark in favor of the personal security of the subject, to protect his person from punishment by legislative acts having a retrospective operation. I do not think it was inserted to secure the citizen in his private rights, of either property, or contracts. The prohibitions not to make anything but gold and silver coin a tender in payment of debts, and not to pass any law impairing the obligation of contracts, were inserted to secure private rights; but the restriction not to pass any ex post facto law was to secure the person of the subject from injury, or punishment, in consequence of such law. If the prohibition against making ex post facto laws was intended to secure personal rights from being affected, or injured, by such laws, and the prohibition is sufficiently extensive for that object, the other restraints I have enumerated were unnecessary, and, therefore, improper; for both of them are retrospective.

I will state what laws I consider ex post facto laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than

3 Dal. 390.

it was when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offence, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive. In my opinion, the true distinction is between ex post facto laws and retrospective laws. Every ex post facto law must necessarily be retrospective; but every retrospective law is not an ex post facto law. The former only are prohibited. Every law, that takes away, or impairs, rights vested agreeably to existing laws, is retrospective, and is generally unjust, and may be oppressive; and it is a good general rule that a law should have no retrospect; but there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement; as statutes of oblivion, or of pardon. They are certainly retrospective, and literally both concerning and after the facts committed. But I do not consider any law ex post facto, within the prohibition, that mollifies the rigor of the criminal law; but only those that create or aggravate the crime, or increase the punishment, or change the rules of evidence, for the purpose of conviction. Every law, that is to have an operation before the making thereof, as to commence at an antecedent time; or to save time from the statute of limitations; or to excuse acts which were unlawful, and before committed, and the like, is retrospective. But such laws may be proper or necessary, as the case may be. There is a great and apparent difference between making an unlawful act lawful and the making an innocent action criminal, and punishing it as a crime. The expressions "ex post facto laws" are technical; they had been in use long before the revolution, and had acquired an appropriate meaning, by legislators, lawyers, and authors. The celebrated and judicious Sir William Blackstone, in his Commentaries, considers an ex post facto law precisely in the same light I have done. His opinion is confirmed by his successor, Mr.

3 Dal. 391.

Wooddeson; and by the author of the Federalist, whom I esteem superior to both, for his extensive and accurate knowledge of the true principles of government.

I also rely greatly on the definition or explanation of ex post facto laws, as given by the conventions of Massachusetts, Maryland and North Carolina, in their several constitutions, or forms of government.

In the declaration of rights by the convention of Massachusetts, part 1, section 24, "Laws made to punish actions done before the existence of such laws, and which have not been declared crimes by preceding laws, are unjust," &c.

In the declaration of rights by the convention of Maryland, article 15th, "Retrospective laws, punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive," &c.

In the declaration of rights by the convention of North Carolina, article 24th, I find the same definition, precisely in the same words, as in the Maryland constitution.

In the declaration of rights by the convention of Delaware, article 11th, the same definition was clearly intended, but inaccurately expressed, by saying, "laws, punishing offences (instead of actions or facts) committed before the existence of such laws, are oppressive," &c.

I am of opinion that the fact, contemplated by the prohibition, and not to be affected by a subsequent law, was some fact to be done by a citizen, or subject.

In 2 Lord Raymond's Reports 1352, Raymond, J. called the statute, 7 Geo. I, statute 2, par. 8, about registering contracts for South Sea stock, an ex post facto law, because it affected contracts made before the statute.

In the present case there is no fact done by Bull and wife, plaintiffs in error, that is in any manner affected by the law or resolution of Connecticut. It does not concern or relate to any act done by them. The decree of the court of probate of Hartford, on the 21st of March, in consequence of which Calder and wife claim a right to the property in question, was given before

the said law, or resolution, and in that sense was affected and set aside by it; and in consequence of the law allowing a hearing, and the decision in favor of the will, they have lost what they would have been entitled to, if the law, or resolution, and the decision in consequence thereof, had not been made. The decree of the court of probate is the only fact on which the law, or resolution, operates. In my judgment the case of the plaintiffs in error is not within the letter of the prohibition; and, for reasons assigned, I am clearly of opinion that it is not within the intention of the prohibition; and if within the intention, but out of the letter, I should not, therefore, consider myself justified to continue it within the prohibition, and, therefore, that the whole was void.

It was argued by the counsel for the plaintiffs in error, that the legislature of Connecticut had no constitutional power to make the resolution, or law, in question, granting a new hearing, &c.

Without giving an opinion, at this time, whether this court has jurisdiction to decide that any law made by congress, contrary to the constitution of the United States, is void; I am fully satisfied that this court has no jurisdiction to determine that any law of any state legislature, contrary to the constitution of such state, is void. Further, if this court had such jurisdiction, yet it does not appear to me, that the resolution, or law, in question, is contrary to the charter of Connecticut, or its constitution, which is said by counsel to be composed of its charter, acts of assembly, and usages and customs. I should think that the courts of Connecticut are the proper tribunals to decide, whether laws contrary to the constitution thereof are void. In the present case they have, both in the inferior and superior courts, determined that the resolution, or law, in question, was not contrary to either their state, or the federal, constitution.

To show that the resolution was contrary to the constitution of the United States, it was contended, that the words, "ex post facto law," have a precise and accurate meaning, and convey but one idea to professional men, which is, "by matter of after fact;

by something after the fact." And Coke upon Littleton, 241, Fearne on Contingent Remainders (old edition), 175 and 203, Powell on Devises, 113, 133, 134, were cited; and the Table to Coke's Reports (by Wilson), title "Ex Post Facto," was referred to. There is no doubt that a man may be a trespasser from the beginning, by a matter of after fact; as, where an entry is given by law, and the party abuses it; or where the law gives a distress, and the party kills, or works, the distress.

I admit, an act unlawful in the beginning may, in some cases, become lawful by matter of after fact.

I also agree that the words, "ex post facto," have the meaning contended for, and no other, in the cases cited, and in all similar cases; where they are used unconnected with, and without relation to, legislative acts, or laws.

There appears to me a manifest distinction between the case where one fact relates to and affects another fact, as, where an after fact, by operation of law, makes a former fact either lawful or unlawful; and the case where a law, made after a fact done, is to operate on and to affect such fact. In the first case both the acts are done by private persons. In the second case the first act is done by a private person, and the second act is done by the legislature to affect the first act.

I believe that but one instance can be found in which a British judge called a statute, that affected contracts made before the statute, an ex post facto law; but the judges of Great Britain always considered penal statutes, that created crimes, or increased the punishment of them, as ex post facto laws.

If the term "ex post facto law" is to be construed to include and to prohibit the enacting of any law after a fact, it will greatly restrict the power of the federal and state legislatures; and the consequences of such a construction may not be foreseen.

If the prohibition, to make no ex post facto laws, extends to all laws made after the fact, the two prohibitions, not to make anything but gold and silver coin a tender in payment of debts, and not to pass any law impairing the obligation of contracts, were improper and unnecessary.

It was further urged, that, if the provision does not extend to prohibit the making any law after a fact, then all choses in action, all lands by devise, all personal property by bequest or distribution, by elegit, by execution, by judgments, particularly on torts, will be unprotected from the legislative power of the states; rights vested may be divested at the will and pleasure of the state legislatures; and, therefore, that the true construction and meaning of the prohibition is, that the states pass no law to deprive a citizen of any right vested in him by existing laws.

It is not to be presumed, that the federal or state legislatures will pass laws to deprive citizens of rights vested in them by existing laws, unless for the benefit of the whole community, and on making full satisfaction. The restraint against making any ex post facto laws was not considered by the framers of the constitution as extending to prohibit the depriving a citizen even of a vested right to property; or the provision, "that private property should not be taken for public use without just compensation," was unnecessary.

It seems to me, that the right of property, in its origin, could only arise from compact, express, or implied, and I think it the better opinion, that the right, as well as the mode, or manner, of acquiring property, and of alienating or transferring, inheriting, or transmitting it, is conferred by society, is regulated by civil institution, and is always subject to the rules prescribed by positive law. When I say that a right is vested in a citizen, I mean that he has the power to do certain actions, or to possess certain things, according to the law of the land.

If any one has a right to property, such right is a perfect and exclusive right; but no one can have such right before he has acquired a better right to the property than any other person in the world; a right, therefore, only to recover property cannot be called a perfect and exclusive right. I cannot agree that a right to property vested in Calder and wife, in consequence of the decree of the 21st of March, 1783, disapproving of the will of Morrison, the grandson. If the will was valid, Mrs. Calder could

3 Dal. 393.

have no right, as heiress of Morrison, the physician; but if the will was set aside, she had an undoubted title.

The resolution, or law, alone, had no manner of effect on any right whatever vested in Calder and wife. The resolution, or law, combined with the new hearing, and the decision in virtue of it, took away their right to recover the property in question. But when combined they took away no right of property vested in Calder and wife; because the decree against the will (21st March, 1783) did not vest in or transfer any property to them.

I am under a necessity to give a construction, or explanation, of the words, "ex post facto law," because they have not any certain meaning attached to them. But I will not go farther than I feel myself bound to do; and if I ever exercise the jurisdiction, I will not decide any law to be void, but in a very clear case.

I am of opinion that the decree of the supreme court of errors of Connecticut be affirmed, with costs.

Paterson, J.—The constitution of Connecticut is made up of usages, and it appears, that its legislature have, from the beginning, exercised the power of granting new trials. This has been uniformly the case till the year 1762, when this power was, by a legislative act, imparted to the superior and county courts. But the act does not remove or annihilate the pre-existing power of the legislature in this particular; it only communicates to other authorities a concurrence of jurisdiction as to the awarding of new trials. And the fact is, that the legislature have, in two instances, exercised this power since the passing of the law in 1762. They acted in a double capacity, as a house of legislation, with undefined authority, and also as a court of judicature in certain exigencies. Whether the latter arose from the indefinite nature of their legislative powers, or in some other way, it is not necessary to discuss. From the best information, however, which I have been able to collect on this subject, it appears, that the legislature, or general court, of Connecticut, originally possessed and exercised all legislative,

executive, and judicial authority : and that, from time to time, they distributed the two latter in such manner as they thought proper; but without parting with the general superintending power, or the right of exercising the same, whenever they should judge it expedient. But be this as it may, it is sufficient for the present to observe, that they have, on certain occasions, exercised judicial authority from the commencement of their civil polity. This usage makes up part of the constitution of Connecticut, and we are bound to consider it as such, unless it be inconsistent with the constitution of the United States. True it is, that the awarding of new trials falls properly within the province of the judiciary; but if the legislature of Connecticut have been in the uninterrupted exercise of this authority in certain cases, we must in such cases respect their decisions as flowing from a competent jurisdiction, or constitutional organ. And, therefore, we may, in the present instance, consider the legislature of the state as having acted in their customary judicial capacity. If so, there is an end of the question. For if the power thus exercised comes more properly within the description of a judicial than of a legislative power; and if, by usage, or the constitution, which in Connecticut are synonymous terms, the legislature of that state acted in both capacities; then, in the case now before us, it would be fair to consider the awarding of a new trial as an act emanating from the judiciary side of the department. But as this view of the subject militates against the plaintiffs in error, their counsel has contended for a reversal of the judgment on the ground, that the awarding of a new trial was the effect of a legislative act, and that it is unconstitutional, because an ex post facto law. For the sake of ascertaining the meaning of these terms, I will consider the resolution of the general court of Connecticut as the exercise of a legislative, and not a judicial authority. The question, then, which arises on the pleadings in this cause, is, whether the resolution of the legislature of Connecticut be an ex post facto law, within the meaning of the constitution of the United States? I am of opinion that it is not. The words, "ex post

3 Dal. 395.

facto," when applied to a law, have a technical meaning, and in legal phraseology refer to crimes, pains, and penalties. Judge Blackstone's description of the terms is clear and accurate. "There is," says he, "a still more unreasonable method than this, which is called making of laws, ex post facto; when, after an action, indifferent in itself, is committed, the legislator, then, for the first time, declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible, that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had, therefore, no cause to abstain from it; and all punishment, for not abstaining, must, of consequence, be cruel and unjust." (1 Blackstone's Commentaries, 46.) Here the meaning annexed to the terms, "ex post facto laws," unquestionably refers to crimes, and nothing else. The historic page abundantly evinces that the power of passing such laws should be withheld from legislators; as it is a dangerous instrument in the hands of bold, unprincipled, aspiring, and party men, and has been too often used to effect the most detestable purposes.

On inspecting such of our state constitutions as take notice of laws made ex post facto, we shall find that they are understood in the same sense.

The constitution of Massachusetts, article 24th of the declaration of rights :—

"Laws, made to punish for actions done before the existence of such laws, and which have not been declared crimes by preceding laws, are unjust, oppressive, and inconsistent with the fundamental principles of a free government."

The constitution of Delaware, article 11th of the declaration of rights :—

"That retrospective laws, punishing offences committed before the existence of such laws, are oppressive and unjust, and ought not to be made."

The constitution of Maryland, article 15th of the declaration of rights :—

3 Dal. 396.

"That retrospective laws, punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty; wherefore no ex post facto law ought to be made."

The constitution of North Carolina, article 24th of the declaration of rights :—

"That retrospective laws, punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty; wherefore no ex post facto law ought to be made."

From the above passages it appears, that ex post facto laws have an appropriate signification; they extend to penal statutes, and no further; they are restricted in legal estimation to the creation, and, perhaps, enhancement, of crimes, pains, and penalties.

The enhancement of a crime, or penalty, seems to come within the same mischief as the creation of a crime or penalty; and therefore they may be classed together.

Again, the words of the constitution of the United States are, "That no state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts." Article 1st, section 10.

Where is the necessity or use of the latter words, if a law impairing the obligation of contracts be comprehended within the terms ex post facto law? It is obvious, from the specification of contracts in the last member of the clause, that the framers of the constitution did not understand or use the words in the sense contended for on the part of the plaintiffs in error. They understood and used the words in their known and appropriate signification, as referring to crimes, pains, and penalties, and no further. The arrangement of the distinct members of this section necessarily points to this meaning.

I had an ardent desire to have extended the provision in the constitution to retrospective laws in general. There is neither policy nor safety in such laws; and, therefore, I have always had a strong aversion against them. It may, in general, be truly observed of retrospective laws of every description, that

3 Dal. 397.

they neither accord with sound legislation, nor the fundamental principles of the social compact. But, on full consideration, I am convinced that ex post facto laws must be limited in the manner already expressed; they must be taken in their technical, which is also their common and general acceptation, and are not to be understood in their literal sense.

Iredell, J.—Though I concur in the general result of the opinions which have been delivered, I cannot entirely adopt the reasons that are assigned upon the occasion.

From the best information to be collected, relative to the constitution of Connecticut, it appears, that the legislature of that state has been in the uniform, uninterrupted habit of exercising a general superintending power over its courts of law, by granting new trials. It may, indeed, appear strange to some of us, that in any form there should exist a power to grant, with respect to suits depending or adjudged, new rights of trial, new privileges of proceeding, not previously recognized and regulated by positive institutions; but such is the established usage of Connecticut, and it is obviously consistent with the general superintending authority of her legislature. Nor is it altogether without some sanction, for a legislature to act as a court of justice. In England we know that one branch of the parliament, the house of lords, not only exercises a judicial power in cases of impeachment, and for the trial of its own members, but, as the court of dernier resort, takes cognizance of many suits at law, and in equity; and that, in construction of law, the jurisdiction there exercised is by the king in full parliament, which shows, that, in its origin, the causes were, probably, heard before the whole parliament. When Connecticut was settled, the right of empowering her legislature to superintend the courts of justice was, I presume, early assumed; and its expediency, as applied to the local circumstances and municipal policy of the state, is sanctioned by a long and uniform practice. The power, however, is judicial in its nature; and whenever it is exercised, as in the present instance, it is an exercise of judicial, not of legislative authority.

3 Dal. 398.

But let us, for a moment, suppose that the resolution, granting a new trial, was a legislative act, it will by no means follow that it is an act affected by the constitutional prohibition, that "no state shall pass any ex post facto law." I will endeavor to state the general principles which influence me on this point, succinctly and clearly, though I have not had an opportunity to reduce my opinion to writing.

If, then, a government, composed of legislative, executive, and judicial departments, were established by a constitution which imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact would be lawfully enacted, and the judicial power could never interpose to pronounce it void. It is true that some speculative jurists have held that a legislative act against natural justice must, in itself, be void; but I cannot think, that, under such a government, any court of justice would possess a power to declare it so. Sir William Blackstone, having put the strong case of an act of parliament which should authorize a man to try his own cause explicitly adds, that, even in that case, "there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature, or no." 1 Blackstone's Commentaries, 91.

In order, therefore, to guard against so great an evil, it has been the policy of all the American states, which have, individually framed their state constitutions since the revolution, and of the people of the United States, when they framed the federal constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act of congress, or of the legislature of a state, violates those constitutional provisions, it is unquestionably void; though, I admit, that, as the authority to declare it void is of a delicate and awful nature, the court will never resort to that authority, but in a clear and urgent case. If, on the other hand, the legislature of the union, or the legislature of any member of the union, shall pass a law within the general

3 Dal. 398.

scope of their constitutional power, the court cannot pronounce it to be void, merely because it is in their judgment contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard; the ablest and the purest men have differed upon the subject; and all that the court could properly say, in such an event, would be, that the legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice. There are, then, but two lights in which the subject can be viewed. 1st. If the legislature pursue the authority delegated to them, their acts are valid. 2d. If they transgress the boundaries of that authority, their acts are invalid. In the former case they exercise the discretion vested in them by the people, to whom alone they are responsible for the faithful discharge of their trust; but in the latter case they violate a fundamental law, which must be our guide, whenever we are called upon as judges to determine the validity of a legislative act.

Still, however, in the present instance, the act, or resolution, of the legislature of Connecticut cannot be regarded as an ex post facto law; for the true construction of the prohibition extends to criminal, not to civil cases. It is only in criminal cases, indeed, in which the danger to be guarded against is greatly to be apprehended. The history of every country in Europe will furnish flagrant instances of tyranny exercised under the pretext of penal dispensations. Rival factions, in their efforts to crush each other, have superseded all the forms, and suppressed all the sentiments of justice; while attainders, on the principle of retaliation and proscription, have marked all the vicissitudes of party triumph. The temptation to such abuses of power is, unfortunately, too alluring for human virtue; and, therefore, the framers of the American constitutions have wisely denied to the respective legislatures, federal as well as state, the possession of the power itself; they shall not pass any ex post facto law; or, in other words, they shall not inflict a punishment for any act which was innocent at the time it was committed; nor

3 Dal. 399.

increase the degree of punishment previously denounced for any specific offence.

The policy, the reason, and humanity of the prohibition, do not, I repeat, extend to civil cases, to cases that merely affect the private property of citizens. Some of the most necessary and important acts of legislation are, on the contrary, founded upon the principle, that private rights must yield to public exigencies. Highways are run through private grounds. Fortifications, light-houses, and other public edifices, are necessarily sometimes built upon the soil owned by individuals. In such and similar cases, if the owners should refuse voluntarily to accommodate the public, they must be constrained, as far as the public necessities require; and justice is done by allowing them a reasonable equivalent. Without the possession of this power the operations of government would often be obstructed, and society itself would be endangered. It is not sufficient to urge that the power may be abused, for such is the nature of all power,—such is the tendency of every human institution; and it might as fairly be said that the power of taxation, which is only circumscribed by the discretion of the body in which it is vested, ought not to be granted, because the legislature, disregarding its true objects, might, for visionary and useless projects, impose a tax to the amount of nineteen shillings in the pound. We must be content to limit power where we can; and where we cannot, consistently with its use, we must be content to repose a salutary confidence. It is our consolation, that there never existed a government, in ancient or modern times, more free from danger, in this respect, than the governments of America.

Upon the whole, though there cannot be a case in which an ex post facto law in criminal matters is requisite, or justifiable, (for Providence never can intend to promote the prosperity of any country by bad means,) yet in the present instance the objection does not arise; because, 1st, if the act of the legislature of Connecticut was a judicial act, it is not within the words of the constitution; and 2d, even if it was a legislative act, it is not within the meaning of the prohibition.

3 Dal. 400.

Cushing, J.—The case appears to me to be clear of all difficulty, taken either way. If the act is a judicial act, it is not touched by the federal constitution; and if it is a legislative act, it is maintained and justified by the ancient and uniform practice of the state of Connecticut.

Judgment affirmed.

3 Dal. 400.

MARTIN v. HUNTER'S LESSEE.

FEBRUARY TERM, 1816.

[1 Wheaton's Reports, 304–382.]

In 1791 Hunter commenced a suit against Martin in one of the district courts of Virginia, where, three years afterwards, a judgment was given in favor of Martin. Hunter appealed to the court of appeals, the hightest court of law in Virginia, and in 1810 obtained a reversal of the judgment of the district court. Martin then brought the case into the supreme court of the United States, by writ of error, and obtained a judgment reversing that of the court of appeals of Virginia, in 1813. Thereupon a mandate issued to the court of appeals requiring the judgment of the supreme court to be carried into effect. This the court of appeals declined doing, upon the ground that the act of congress allowing appeals from that court to the supreme court was not in pursuance of the constitution of the United States. A writ of error was taken out by Martin, founded upon this refusal to obey the mandate of the supreme court; and in February term, 1816, the opinion of the supreme court was delivered by Judge Story, as follows:—

This is a writ of error from the court of appeals of Virginia, founded upon the refusal of that court to obey the mandate of this court, requiring the judgment rendered in this very cause, at February term, 1813, to be carried into due execution. The following is the judgment of the court of appeals rendered on the mandate: "The court is unanimously of opinion that the appellate power of the supreme court of the United States does not extend to this court, under a sound construction of the constitution of the United States; that so much of the twenty-fifth section of the act of congress to establish the judicial courts of the

1 Wh. 323.

United States, as extends the appellate jurisdiction of the supreme court to this court, is not in pursuance of the constitution of the United States; that the writ of error in this cause was improvidently allowed under the authority of that act; that the proceedings thereon in the supreme court were *coram non judice*, in relation to this court, and that obedience to its mandate be declined by the court."

The questions involved in this judgment are of great importance and delicacy. Perhaps it is not too much to affirm, that, upon their right decision, rest some of the most solid principles which have hitherto been supposed to sustain and protect the constitution itself. The great respectability, too, of the court whose decisions we are called upon to review, and the entire deference which we entertain for the learning and ability of that court, add much to the difficulty of the task which has so unwelcomely fallen upon us. It is, however, a source of consolation, that we have had the assistance of most able and learned arguments to aid our inquiries; and that the opinion which is now to be pronounced has been weighed with every solicitude to come to a correct result, and matured after solemn deliberation.

Before proceeding to the principal questions, it may not be unfit to dispose of some preliminary considerations which have grown out of the arguments at the bar.

The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but, emphatically, as the preamble of the constitution declares, by "the people of the United States." There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary, to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority. As little doubt can there be that the people had a right to prohibit to the states the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact; to make the powers of the state governments, in given

cases, subordinate to those of the nation, or to reserve to themselves those sovereign authorities which they might not choose to delegate to either. The constitution was not, therefore, necessarily carved out of existing state sovereignties, nor a surrender of powers already existing in state institutions; for the powers of the states depend upon their own constitutions; and the people of every state had the right to modify and restrain them according to their own views of policy or principle. On the other hand, it is perfectly clear, that the sovereign powers vested in the state governments by their respective constitutions remained unaltered and unimpaired, except so far as they were granted to the government of the United States.

These deductions do not rest upon general reasoning, plain and obvious as they seem to be. They have been positively recognized by one of the articles in amendment of the constitution, which declares that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." The government, then, of the United States, can claim no powers which are not granted to it by the constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication. On the other hand, this instrument, like every other grant, is to have a reasonable construction, according to the import of its terms; and where a power is expressly given in general terms, it is not to be restrained to particular cases, unless that construction grow out of the context expressly, or by necessary implication. The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged.

The constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the

1 Wh. 325.

exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom, and the public interests, should require.

With these principles in view, principles in respect to which no difference of opinion ought to be indulged, let us now proceed to the interpretation of the constitution, so far as regards the great points in controversy.

The third article of the constitution is that which must principally attract our attention. The first section declares "the judicial power of the United States shall be vested in one supreme court, and in such other inferior courts as the congress may, from time to time, ordain and establish." The second section declares that "the judicial power shall extend to all cases in law or equity, arising under this constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state, claiming lands under the grants of different states; and between a state or the citizens thereof, and foreign states, citizens, or subjects." It then proceeds to declare, that, "in all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the su-

1 Wh. 327.

preme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make."

Such is the language of the article creating and defining the judicial power of the United States. It is the voice of the whole American people solemnly declared, in establishing one great department of that government which was in many respects national, and in all supreme. It is a part of the very same instrument which was to act not merely upon individuals, but upon states; and to deprive them altogether of the exercise of some powers of sovereignty, and to restrain and regulate them in the exercise of others.

Let this article be carefully weighed and considered. The language of the article throughout is manifestly designed to be mandatory upon the legislature. Its obligatory force is so imperative that congress could not, without a violation of its duty, have refused to carry it into operation. The judicial power of the United States *shall* be vested (not *may* be vested) in one supreme court, and in such inferior courts as congress may, from time to time, ordain and establish. Could congress have lawfully refused to create a supreme court, or to vest in it the constitutional jurisdiction? "The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive, for their services, a compensation which shall not be diminished during their continuance in office." Could congress create or limit any other tenure of the judicial office? Could they refuse to pay, at stated times, the stipulated salary, or diminish it during the continuance in office? But one answer can be given to these questions: it must be in the negative. The object of the constitution was to establish three great departments of government; the legislative, the executive, and the judicial department. The first was to pass laws, the second to approve and execute them, and the third to expound and enforce them. Without the latter, it would be impossible to carry into effect some of the express provisions of the constitution. How, otherwise, could crimes against the

1 Wh. 328.

United States be tried and punished? How could causes between two states be heard and determined? The judicial power must, therefore, be vested in some court, by congress; and to suppose that it was not an obligation binding on them, but might, at their pleasure, be omitted or declined, is to suppose, that, under the sanction of the constitution, they might defeat the constitution itself;—a construction which would lead to such a result cannot be sound.

The same expression, "shall be vested," occurs in other parts of the constitution, in defining the power of the other co-ordinate branches of the government. The first article declares that "all legislative powers herein granted shall be vested in a congress of the United States." Will it be contended that the legislative power is not absolutely vested? that the words merely refer to some future act, and mean only that the legislative power may hereafter be vested? The second article declares that "the executive power shall be vested in a president of the United States of America." Could congress vest it in any other person; or is it to await their good pleasure, whether it is to vest at all? It is apparent, that such a construction, in either case, would be utterly inadmissible. Why, then, is it entitled to a better support in reference to the judicial department?

If, then, it is a duty of congress to vest the judicial power of the United States, it is a duty to vest the whole judicial power. The language, if imperative as to one part, is imperative as to all. If it were otherwise, this anomaly would exist, that congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the constitution, and thereby defeat the jurisdiction as to all; for the constitution has not singled out any class on which congress are bound to act in preference to others.

The next consideration is as to the courts in which the judicial power shall be vested. It is manifest that a supreme court must be established; but whether it be equally obligatory, to establish inferior courts, is a question of some difficulty. If congress may lawfully omit to establish inferior courts, it might

1 Wh. 330.

follow, that in some of the enumerated cases the judicial power could nowhere exist. The supreme court can have original jurisdiction in two classes of cases only, namely, in cases affecting ambassadors, other public ministers, and consuls, and in cases in which a state is a party. Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself; and if, in any of the cases enumerated in the constitution, the state courts did not then possess jurisdiction, the appellate jurisdiction of the supreme court (admitting that it could act on state courts) could not reach those cases, and, consequently, the injunction of the constitution, that the judicial power "shall be vested," would be disobeyed. It would seem, therefore, to follow, that congress are bound to create some inferior courts, in which to vest all that jurisdiction which, under the constitution, is exclusively vested in the United States, and of which the supreme court cannot take original cognizance. They might establish one or more inferior courts; they might parcel out the jurisdiction among such courts, from time to time, at their own pleasure. But the whole judicial power of the United States should be, at all times, vested, either in an original or appellate form, in some courts created under its authority.

This construction will be fortified by an attentive examination of the second section of the third article. The words are, "the judicial power shall extend," &c. Much minute and elaborate criticism has been employed upon these words. It has been argued, that they are equivalent to the words "may extend," and that "extend" means to widen to new cases not before within the scope of the power. For the reasons which have been already stated, we are of opinion that the words are used in an imperative sense. They import an absolute grant of judicial power. They cannot have a relative signification applicable to powers already granted; for the American people had not made any previous grant. The constitution was for a new government, organized with new substantive powers, and not a mere supplementary charter to a government already existing. The con-

1 Wh. 331.

federation was a compact between states; and its structure and powers were wholly unlike those of the national government. The constitution was an act of the people of the United States to supersede the confederation, and not to be ingrafted on it, as a stock through which it was to receive life and nourishment.

If, indeed, the relative signification could be fixed upon the term "extend," it could not (as we shall hereafter see) subserve the purposes of the argument in support of which it has been adduced. This imperative sense of the words, "shall extend," is strengthened by the context. It is declared, that, "in all cases affecting ambassadors, &c., the supreme court shall have original jurisdiction." Could congress withhold original jurisdiction in these cases from the supreme court? The clause proceeds,—"in all the other cases before mentioned the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make." The very exception here shows that the framers of the constitution used the words in an imperative sense. What necessity could there exist for this exception, if the preceding words were not used in that sense? Without such exception, congress would, by the preceding words, have possessed a complete power to regulate the appellate jurisdiction, if the language were only equivalent to the words "may have" appellate jurisdiction. It is apparent, then, that the exception was intended as a limitation upon the preceding words, to enable congress to regulate and restrain the appellate power, as the public interests might, from time to time, require.

Other clauses in the constitution might be brought in aid of this construction; but a minute examination of them cannot be necessary, and would occupy too much time. It will be found, that whenever a particular object is to be effected, the language of the constitution is always imperative, and cannot be disregarded without violating the first principles of public duty. On the other hand, the legislative powers are given in language which implies discretion, as, from the nature of legislative power, such a discretion must ever be exercised.

1 Wh. 332.

It being, then, established, that the language of this clause is imperative, the next question is as to the cases to which it shall apply. The answer is found in the constitution itself. The judicial power shall extend to all the cases enumerated in the constitution. As the mode is not limited, it may extend to all such cases, in any form in which judicial power may be exercised. It may, therefore, extend to them in the shape of original or appellate jurisdiction, or both; for there is nothing in the nature of the cases which binds to the exercise of the one in preference to the other.

In what cases (if any) is this judicial power exclusive, or exclusive at the election of congress? It will be observed, that there are two classes of cases enumerated in the constitution, between which a distinction seems to be drawn. The first class includes cases arising under the constitution, laws, and treaties of the United States; cases affecting ambassadors, other public ministers, and consuls, and cases of admiralty and maritime jurisdiction. In this class the expression is, and that "the judicial power shall extend to all cases;" but in the subsequent part of the clause, which embraces all the other cases of national cognizance, and forms the second class, the word "all" is dropped, seemingly *ex industriâ*. Here the judicial authority is to "extend to controversies" (not to all controversies) "to which the United States shall be a party," &c. From this difference of phraseology, perhaps, a difference of constitutional intention may with propriety be inferred. It is hardly to be presumed, that the variation in the language could have been accidental. It must have been the result of some determinate reason; and it is not very difficult to find a reason sufficient to support the apparent change of intention. In respect to the first class, it may well have been the intention of the framers of the constitution, imperatively to extend the judicial power, either in an original or appellate form, to all cases; and in the latter class to leave it to congress to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate.

The vital importance of all the cases enumerated in the first

1 Wh. 334.

class to the national sovereignty might warrant such a distinction. In the first place, as to cases arising under the constitution, laws, and treaties of the United States. Here the state courts could not, ordinarily, possess a direct jurisdiction. The jurisdiction over such cases could not exist in the state courts previous to the adoption of the constitution, and it could not afterwards be directly conferred on them; for the constitution expressly requires the judicial power to be vested in courts ordained and established by the United States. This class of cases would embrace civil as well as criminal jurisdiction, and affect not only our internal policy, but our foreign relations. It would, therefore, be perilous to restrain it in any manner whatsoever, inasmuch as it might hazard the national safety. The same remarks may be urged as to cases affecting ambassadors, other public ministers, and consuls, who are emphatically placed under the guardianship of the law of nations; and as to cases of admiralty and maritime jurisdiction, the admiralty jurisdiction embraces all questions of prize and salvage, in the correct adjudication of which foreign nations are deeply interested; it embraces also maritime torts, contracts, and offences, in which the principles of the law and comity of nations often form an essential inquiry. All these cases, then, enter into the national policy, affect the national rights, and may compromit the national sovereignty. The original or appellate jurisdiction ought not, therefore, to be restrained, but should be commensurate with the mischiefs intended to be remedied, and, of course, should extend to all cases whatsoever.

A different policy might well be adopted in reference to the second class of cases; for although it might be fit, that the judicial power should extend to all controversies to which the United States should be a party, yet this power might not have been imperatively given, lest it should imply a right to take cognizance of original suits brought against the United States as defendants in their own courts. It might not have been deemed proper, to submit the sovereignty of the United States, against their own will, to judicial cognizance, either to enforce rights

1 Wh. 335.

or to prevent wrongs; and as to the other cases of the second class, they might well be left to be exercised under the exceptions and regulations which congress might, in their wisdom, choose to apply. It is also worthy of remark, that congress seem, in a good degree, in the establishment of the present judicial system, to have adopted this distinction. In the first class of cases, the jurisdiction is not limited except by the subject-matter; in the second, it is made materially to depend upon the value in controversy.

We do not, however, profess to place any implicit reliance upon the distinction which has here been stated and endeavored to be illustrated. It has the rather been brought into view in deference to the legislative opinion which has so long acted upon and enforced this distinction. But there is, certainly, vast weight in the argument which has been urged, that the constitution is imperative upon congress to vest all the judicial power of the United States, in the shape of original jurisdiction, in the supreme and inferior courts created under its own authority. At all events, whether the one construction or the other prevail, it is manifest that the judicial power of the United States is unavoidably, in some cases, exclusive of all state authority, and, in all others, may be made so at the election of congress. No part of the criminal jurisdiction of the United States can, consistently with the constitution, be delegated to state tribunals. The admiralty and maritime jurisdiction is of the same exclusive cognizance; and it can only be in those cases where, previous to the constitution, state tribunals possessed jurisdiction independent of national authority, that they can now constitutionally exercise a concurrent jurisdiction. Congress, throughout the judicial act, and particularly in the ninth, eleventh, and thirteenth sections, have legislated upon the supposition, that, in all the cases to which the judicial powers of the United States extended, they might rightfully vest exclusive jurisdiction in their own courts.

But even admitting that the language of the constitution is not mandatory, and that congress may constitutionally omit to

1 Wh. 336.

vest the judicial power in courts of the United States, it cannot be denied, that, when it is vested, it may be exercised to the utmost constitutional extent.

This leads us to the consideration of the great question as to the nature and extent of the appellate jurisdiction of the United States. We have already seen that appellate jurisdiction is given by the constitution to the supreme court in all cases where it has not original jurisdiction; subject, however, to such exceptions and regulations as congress may prescribe. It is, therefore, capable of embracing every case enumerated in the constitution which is not exclusively to be decided by way of original jurisdiction. But the exercise of appellate jurisdiction is far from being limited, by the terms of the constitution, to the supreme court. There can be no doubt that congress may create a succession of inferior tribunals, in each of which it may vest appellate as well as original jurisdiction. The judicial power is delegated by the constitution in the most general terms, and may, therefore, be exercised by congress under every variety of form, of appellate or original jurisdiction. And as there is nothing in the constitution which restrains or limits this power, it must, therefore, in all other cases, subsist in the utmost latitude of which, in its own nature, it is susceptible.

As, then, by the terms of the constitution, the appellate jurisdiction is not limited as to the supreme court, and as to this court it may be exercised in all other cases than those of which it has original cognizance, what is there to restrain its exercise over state tribunals in the enumerated cases? The appellate power is not limited by the terms of the third article to any particular courts. The words are, "the judicial power" (which includes appellate power) "shall extend to all cases," &c., and "in all other cases before mentioned, the supreme court shall have appellate jurisdiction." It is the case, then, and not the court, that gives the jurisdiction. If the judicial power extends to the case, it will be in vain to search in the letter of the constitution for any qualification as to the tribunal where it depends. It is incumbent, then, upon those who assert such a qualifica-

1 Wh. 338.

tion to show its existence by necessary implication. If the text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible.

If the constitution meant to limit the appellate jurisdiction to cases pending in the courts of the United States, it would necessarily follow, that the jurisdiction of these courts would, in all the cases enumerated in the constitution, be exclusive of state tribunals. How otherwise could the jurisdiction extend to all cases arising under the constitution, laws, and treaties of the United States, or to all cases of admiralty and maritime jurisdiction? If some of these cases might be entertained by state tribunals, and no appellate jurisdiction as to them should exist, then the appellate power would not extend to all, but to some, cases. If state tribunals might exercise concurrent jurisdiction over all or some of the other classes of cases in the constitution without control, then the appellate jurisdiction of the United States might, as to such cases, have no real existence, contrary to the manifest intent of the constitution. Under such circumstances, to give effect to the judicial power, it must be construed to be exclusive; and this not only when the *casus fœderis* should arise directly, but when it should arise incidentally, in cases pending in state courts. This construction would abridge the jurisdiction of such courts far more than has been ever contemplated in any act of congress.

On the other hand, if, as has been contended, a discretion be vested in congress to establish, or not to establish, inferior courts at their own pleasure, and congress should not establish such courts, the appellate jurisdiction of the supreme court would have nothing to act upon, unless it could act upon cases pending in the state courts. Under such circumstances, it must be held, that the appellate power would extend to state courts; for the constitution is peremptory that it shall extend to certain enumerated cases, which cases could exist in no other courts. Any other construction, upon this supposition, would involve this strange contradiction, that a discretionary power vested in congress, and which they might rightfully omit to exercise, would

1 Wh. 339.

defeat the absolute injunctions of the constitution in relation to the whole appellate power.

But it is plain, that the framers of the constitution did contemplate that cases within the judicial cognizance of the United States not only might but would arise in the state courts, in the exercise of their ordinary jurisdiction. With this view the sixth article declares that "this constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." It is obvious, that this obligation is imperative upon the state judges in their official, and not merely in their private capacities. From the very nature of their judicial duties, they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely according to the laws or constitution of the state, but according to the constitution, laws, and treaties of the United States,—"the supreme law of the land."

A moment's consideration will show us the necessity and propriety of this provision in cases where the jurisdiction of the state courts is unquestionable. Suppose a contract for the payment of money is made between citizens of the same state, and performance thereof is sought in the courts of that state; no person can doubt that the jurisdiction completely and exclusively attaches, in the first instance, to such courts. Suppose at the trial the defendant sets up in his defence a tender under a state law making paper money a good tender, or a state law impairing the obligation of such contract, which law, if binding, would defeat the suit. The constitution of the United States has declared that no state shall make anything but gold or silver coin a tender in payment of debts, or pass a law impairing the obligation of contracts. If congress shall not have passed a law providing for the removal of such a suit to the courts of the United States, must not the state court proceed to hear and determine

1 Wh. 340.

it? Can a mere plea in defence be of itself a bar to further proceedings, so as to prohibit an inquiry into its truth or legal propriety, when no other tribunal exists to whom judicial cognizance of such cases is confided? Suppose an indictment for a crime in a state court, and the defendant should allege in his defence that the crime was created by an ex post facto act of the state; must not the state court, in the exercise of a jurisdiction which has already rightfully attached, have a right to pronounce on the validity and sufficiency of the defence? It would be extremely difficult, upon any legal principles, to give a negative answer to these inquiries. Innumerable instances of the same sort might be stated, in illustration of the position; and unless the state courts could sustain jurisdiction in such cases, this clause of the sixth article would be without meaning or effect, and public mischiefs, of a most enormous magnitude, would inevitably ensue.

It must, therefore, be conceded, that the constitution not only contemplated, but meant to provide for, cases within the scope of the judicial power of the United States, which might yet depend before state tribunals. It was foreseen, that, in the exercise of their ordinary jurisdiction, state courts would incidentally take cognizance of cases arising under the constitution, the laws, and treaties of the United States. Yet to all these cases the judicial power, by the very terms of the constitution, is to extend. It cannot extend by original jurisdiction, if that had already rightfully and exclusively attached in the state courts, which (as has been already shown) may occur; it must, therefore, extend by appellate jurisdiction, or not at all. It would seem to follow, that the appellate power of the United States must, in such cases, extend to state tribunals; and if in such cases, there is no reason why it should not equally attach upon all others within the purview of the constitution.

It has been argued, that such an appellate jurisdiction over state courts is inconsistent with the genius of our government, and the spirit of the constitution; that the latter was never designed to act upon state sovereignties, but only upon the peo-

1 Wh. 342.

ple; and that, if the power exists, it will materially impair the sovereignty of the states, and the independence of their courts. We cannot yield to the force of this reasoning; it assumes principles which we cannot admit, and draws conclusions to which we do not yield our assent.

It is a mistake, that the constitution was not designed to operate upon states, in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the states in some of the highest branches of their prerogatives. The tenth section of the first article contains a long list of disabilities and prohibitions imposed upon the states. Surely, when such essential portions of state sovereignty are taken away, or prohibited to be exercised, it cannot be correctly asserted, that the constitution does not act upon the states. The language of the constitution is also imperative upon the states as to the performance of many duties. It is imperative upon the state legislatures to make laws prescribing the time, places, and manner of holding elections for senators and representatives, and for electors of president and vice-president. And in these, as well as some other cases, congress have a right to revise, amend, or supersede the laws which may be passed by state legislatures. When, therefore, the states are stripped of some of the highest attributes of sovereignty, and the same are given to the United States, when the legislatures of the states are, in some respects, under the control of congress, and in every case are, under the constitution, bound by the paramount authority of the United States; it is certainly difficult to support the argument, that the appellate power over the decisions of state courts is contrary to the genius of our institutions. The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the states, and, if they are found to be contrary to the constitution, may declare them to be of no legal validity. Surely, the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power.

Nor can such a right be deemed to impair the independence

1 Wh. 343.

of state judges. It is assuming the very ground in controversy, to assert that they possess an absolute independence of the United States. In respect to the powers granted to the United States, they are not independent; they are expressly bound to obedience by the letter of the constitution; and if they should unintentionally transcend their authority, or misconstrue the constitution, there is no more reason for giving their judgments an absolute and irresistible force than for giving it to the acts of the other co-ordinate departments of state sovereignty.

The argument urged from the possibility of the abuse of the revising power is equally unsatisfactory. It is always a doubtful course, to argue against the use or existence of a power, from the possibility of its abuse. It is still more difficult, by such an argument, to ingraft upon a general power a restriction which is not to be found in the terms in which it is given. From the very nature of things, the absolute right of decision, in the last resort, must rest somewhere; wherever it may be vested it is susceptible of abuse. In all questions of jurisdiction the inferior, or the appellate court, must pronounce the final judgment; and common sense, as well as legal reasoning, has conferred it upon the latter.

It has been further argued against the existence of this appellate power, that it would form a novelty in our judicial institutions. This is certainly a mistake. In the articles of confederation, an instrument framed with infinitely more deference to state rights and state jealousies, a power was given to congress to establish "courts for revising and determining, finally, appeals in all cases of captures." It is remarkable, that no power was given to entertain original jurisdiction in such cases; and, consequently, the appellate power (although not so expressed in terms) was altogether to be exercised in revising the decisions of state tribunals. This was, undoubtedly, so far a surrender of state sovereignty; but it never was supposed to be a power fraught with public danger, or destructive of the independence of state judges. On the contrary, it was supposed to be a power indispensable to the public safety, inasmuch as our national

1 Wh. 345.

rights might otherwise be compromitted, and our national peace be endangered. Under the present constitution the prize jurisdiction is confined to the courts of the United States; and a power to revise the decisions of state courts, if they should assert jurisdiction over prize causes, cannot be less important, or less useful, than it was under the confederation.

In this connexion we are led again to the construction of the words of the constitution, "the judicial power shall extend," &c. If, as has been contended at the bar, the term "extend" have a relative signification, and mean to widen an existing power, it will then follow, that, as the confederation gave an appellate power over state tribunals, the constitution enlarged or widened that appellate power to all the other cases in which jurisdiction is given to the courts of the United States. It is not presumed, that the learned counsel would choose to adopt such a conclusion.

It is further argued, that no great public mischief can result from a construction which shall limit the appellate power of the United States to cases in their own courts; first, because state judges are bound by an oath to support the constitution of the United States, and must be presumed to be men of learning and integrity; and, secondly, because congress must have an unquestionable right to remove all cases within the scope of the judicial power from the state courts to the courts of the United States, at any time before final judgment, though not after final judgment. As to the first reason,—admitting that the judges of the state courts are, and always will be, of as much learning, integrity, and wisdom, as those of the courts of the United States, (which we very cheerfully admit,) it does not aid the argument. It is manifest, that the constitution has proceeded upon a theory of its own, and given or withheld powers according to the judgment of the American people, by whom it was adopted. We can only construe its powers, and cannot inquire into the policy or principles which induced the grant of them. The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state

1 Wh. 346.

jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. Hence, in controversies between states, between citizens of different states, between citizens claiming grants under different states, between a state and its citizens, or foreigners, and between citizens and foreigners, it enables the parties, under the authority of congress, to have the controversies heard, tried, and determined before the national tribunals. No other reason than that which has been stated can be assigned, why some, at least, of those cases should not have been left to the cognizance of the state courts. In respect to the other enumerated cases,—the cases arising under the constitution, laws, and treaties of the United States, cases affecting ambassadors and other public ministers, and cases of admiralty and maritime jurisdiction,—reasons of a higher and more extensive nature, touching the safety, peace, and sovereignty of the nation, might well justify a grant of exclusive jurisdiction.

This is not all. A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity, of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself. If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed, that they could have escaped the enlightened convention which formed the constitution. What, indeed, might then have been only prophecy, has now become fact; and the appellate jurisdiction must continue to be the only adequate remedy for such evils.

1 Wh. 347.

There is an additional consideration, which is entitled to great weight. The constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum. Yet, if the construction contended for be correct, it will follow, that, as the plaintiff may always elect the state court, the defendant may be deprived of all the security which the constitution intended in aid of his rights. Such a state of things can in no respect be considered as giving equal rights. To obviate this difficulty, we are referred to the power which, it is admitted, congress possess to remove suits from state courts to the national courts; and this forms the second ground upon which the argument we are considering has been attempted to be sustained.

This power of removal is not to be found in express terms in any part of the constitution; if it be given, it is only given by implication, as a power necessary and proper to carry into effect some express power. The power of removal is certainly not, in strictness of language, an exercise of original jurisdiction; it presupposes an exercise of original jurisdiction to have attached elsewhere. The existence of this power of removal is familiar in courts acting according to the course of the common law in criminal as well as civil cases, and it is exercised before as well as after judgment. But this is always deemed in both cases an exercise of appellate, and not of original, jurisdiction. If, then, the right of removal be included in the appellate jurisdiction, it is only because it is one mode of exercising that power; and as congress is not limited by the constitution to any particular mode or time of exercising it, it may authorize a removal either before or after judgment. The time, the process, and the manner, must be subject to its absolute legislative control. A writ of error is, indeed, but a process which removes the record of

one court to the possession of another court, and enables the latter to inspect the proceedings, and give such judgment as its own opinion of the law and justice of the case may warrant. There is nothing in the nature of the process which forbids it from being applied by the legislature to interlocutory as well as final judgments. And if the right of removal from state courts exist before judgment, because it is included in the appellate power, it must, for the same reason, exist after judgment. And if the appellate power by the constitution does not include cases pending in state courts, the right of removal, which is but a mode of exercising that power, cannot be applied to them. Precisely the same objections, therefore, exist as to the right of removal before judgment, as after, and both must stand or fall together. Nor, indeed, would the force of the arguments on either side materially vary, if the right of removal were an exercise of original jurisdiction. It would equally trench upon the jurisdiction and independence of state tribunals.

The remedy, too, of removal of suits would be utterly inadequate to the purposes of the constitution, if it could act only on the parties, and not upon the state courts. In respect to criminal prosecutions the difficulty seems admitted to be insurmountable; and in respect to civil suits, there would, in many cases, be rights without corresponding remedies. If state courts should deny the constitutionality of the authority to remove suits from their cognizance, in what manner could they be compelled to relinquish the jurisdiction? In respect to criminal cases there would at once be an end of all control, and the state decisions would be paramount to the constitution; and though in civil suits the courts of the United States might act upon the parties, yet the state courts might act in the same way; and this conflict of jurisdictions would not only jeopardize private rights, but bring into imminent peril the public interests.

On the whole, the court are of opinion that the appellate power of the United States does extend to cases pending in the state courts; and that the twenty-fifth section of the judiciary act, which authorizes the exercise of this jurisdiction in

1 Wh. 350.

the specified cases, by a writ of error, is supported by the letter and spirit of the constitution. We find no clause in that instrument which limits this power; and we dare not interpose a limitation where the people have not been disposed to create one.

Strong as this conclusion stands upon the general language of the constitution, it may still derive support from other sources. It is a historical fact, that this exposition of the constitution, extending its appellate power to state courts, was, previous to its adoption, uniformly and publicly avowed by its friends, and admitted by its enemies, as the basis of their respective reasonings, both in and out of the state conventions. It is a historical fact, that, at the time when the judiciary act was submitted to the deliberations of the first congress, composed, as it was, not only of men of great learning and ability, but of men who had acted a principle part in framing, supporting, or opposing that constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system. It is a historical fact, that the supreme court of the United States have, from time to time, sustained this appellate jurisdiction in a great variety of cases, brought from the tribunals of many of the most important states in the union, and that no state tribunal has ever breathed a judicial doubt on the subject, or declined to obey the mandate of the supreme court, until the present occasion. This weight of contemporaneous exposition by all parties, this acquiescence of enlightened state courts, and these judicial decisions of the supreme court through so long a period, do, as we think, place the doctrine upon a foundation of authority which cannot be shaken, without delivering over the subject to perpetual and irremediable doubts.

The next question which has been argued is, whether the case at the bar be within the purview of the twenty-fifth section of the judiciary act, so that this court may rightfully sustain the present writ of error. This section, stripped of passages unimportant in this inquiry, enacts, in substance, that a final judgment or decree in any suit in the highest court of law or equity of a state—where is drawn in question the validity of a treaty or

statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties, or laws, of the United States, and the decision is in favor of such their validity; or of the constitution, or of a treaty or statute of, or commission held under, the United States, and the decision is against the title, right, privilege, or exemption, specially set up or claimed by either party under such clause of the said constitution, treaty, statute, or commission—may be re-examined and reversed or affirmed in the supreme court of the United States upon a writ of error, in the same manner, and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a circuit court; and the proceeding upon the reversal shall also be the same, except that the supreme court, instead of remanding the cause for a final decision, as before provided, may, at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. But no other error shall be assigned or regarded as a ground of reversal, in any such case as aforesaid, than such as appears upon the face of the record, and immediately respects the before-mentioned question of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute.

That the present writ of error is founded upon a judgment of the court below, which drew in question and denied the validity of a statute of the United States, is incontrovertible, for it is apparent upon the face of the record. That this judgment is final upon the rights of the parties is equally true; for, if well founded, the former judgment of that court was of conclusive authority, and the former judgment of this court utterly void. The decision was, therefore, equivalent to a perpetual stay of proceedings upon the mandate, and a perpetual denial of all the rights acquired under it. The case, then, falls directly within the terms of the act. It is a final judgment in a suit in a

1 Wh. 353.

state court, denying the validity of a statute of the United States; and unless a distinction can be made between proceedings under a mandate and proceedings in an original suit, a writ of error is the proper remedy to revise that judgment. In our opinion no legal distinction exists between the cases.

In causes remanded to the circuit courts, if the mandate be not correctly executed, a writ of error or appeal has always been supposed to be a proper remedy, and has bees recognized as such in the former decisions of this court. The statute gives the same effect to writs of error from the judgments of state courts as of the circuit courts; and in its terms provides for proceedings where the same cause may be a second time brought up on writ of error before the supreme court. There is no limitation or description of the cases to which the second writ of error may be applied; and it ought, therefore, to be co-extensive with the cases which fall within the mischiefs of the statute. It will hardly be denied that this cause stands in that predicament; and if so, then the appellate jurisdiction of this court has rightfully attached.

But it is contended, that the former judgment of this court was rendered upon a case not within the purview of this section of the judicial act, and that, as it was pronounced by an incompetent jurisdiction, it was utterly void, and cannot be a sufficient foundation to sustain any subsequent proceedings. To this argument several answers may be given. In the first place, it is not admitted, that, upon this writ of error, the former record is before us. The error now assigned is not in the former proceedings, but in the judgment rendered upon the mandate issued after the former judgment. The question now litigated is not upon the construction of a treaty, but upon the constitutionality of a statute of the United States, which is clearly within our jurisdiction. In the next place, in ordinary cases a second writ of error has never been supposed to draw in question the propriety of the first judgment, and it is difficult to perceive how such a proceeding could be sustained upon principle. A final judgment of this court is supposed to be conclusive

upon the rights which it decides, and no statute has provided any process by which this court can revise its own judgments. In several cases, which have been formerly adjudged in this court, the same point was argued by counsel, and expressly overruled. It was solemnly held, that a final judgment of this court was conclusive upon the parties and could not be re-examined.

In this case, however, from motives of a public nature, we are entirely willing to waive all objections, and to go back and re-examine the question of jurisdiction as it stood upon the record formerly in judgment. We have great confidence that our jurisdiction will, on a careful examination, stand confirmed as well upon principle as authority. It will be recollected, that the action was an ejectment for a parcel of land in the Northern Neck, formerly belonging to Lord Fairfax. The original plaintiff claimed the land under a patent granted to him by the state of Virginia, in 1789, under a title supposed to be vested in that state by escheat or forfeiture. The original defendant claimed the land as devisee under the will of Lord Fairfax. The parties agreed to a special statement of facts in the nature of a special verdict, upon which the district court of Winchester, in 1793, gave a general judgment for the defendant, which judgment was afterwards reversed in 1810, by the court of appeals, and a general judgment was rendered for the plaintiff; and from this last judgment a writ of error was brought to the supreme court. The statement of facts contained a regular deduction of the title of Lord Fairfax until his death, in 1781, and also the title of his devisee. It also contained a regular deduction of the title of the plaintiff under the state of Virginia, and further referred to the treaty of peace of 1783, and to the acts of Virginia respecting the lands of Lord Fairfax, and the supposed escheat or forfeiture thereof, as component parts of the case. No facts disconnected with the titles thus set up by the parties were alleged on either side. It is apparent from this summary explanation, that the title thus set up by the plaintiff might be open to other objections; but the title of the defendant was perfect and com-

1 Wh. 355.

plete, if it was protected by the treaty of 1783. If, therefore, this court had authority to examine in to the whole record, and to decide upon the legal validity of the title of the defendant, as well as its application to the treaty of peace, it would be a case within the express purview of the twenty-fifth section of the act; for there was nothing in the record upon which the court below could have decided but upon the title as connected with the treaty; and if the title was otherwise good, its sufficiency must have depended altogether upon its protection under the treaty. Under such circumstances it was strictly a suit where was drawn in question the construction of a treaty, and the decision was against the title specially set up or claimed by the defendant. It would fall, then, within the very terms of the act.

The objection urged at the bar is, that this court cannot inquire into the title, but simply into the correctness of the construction put upon the treaty by the court of appeals; and that their judgment is not re-examinable here, unless it appear on the face of the record, that some construction was put upon the treaty. If, therefore, that court might have decided the case upon the invalidity of the title, (and, non constat, that they did not,) independent of the treaty, there is an end of the appellate jurisdiction of this court. In support of this objection much stress is laid upon the last clause of the section, which declares that no other cause shall be regarded as a ground of reversal than such as appears on the face of the record, and immediately respects the construction of the treaty, &c., in dispute.

If this be the true construction of the section, it will be wholly inadequate for the purposes which it professes to have in view, and may be evaded at pleasure. But we see no reason for adopting this narrow construction; and there are the strongest reasons against it, founded upon the words as well as the intent of the legislature. What is the case for which the body of the section provides a remedy by writ of error? The answer must be in the words of the section, a suit where is drawn in question the construction of a treaty, and the decision is against

1 Wh. 357.

the title set up by the party. It is, therefore, the decision against the title set up with reference to the treaty, and not the mere abstract construction of the treaty itself, upon which the statute intends to found the appellate jurisdiction. How, indeed, can it be possible to decide whether a title be within the protection of a treaty, until it is ascertained what that title is, and whether it have a legal validity? From the very necessity of the case, there must be a preliminary inquiry into the existence and structure of the title, before the court can construe the treaty in reference to that title. If the court below should decide that the title was bad, and, therefore, not protected by the treaty, must not this court have a power to decide the title to be good, and, therefore, protected by the treaty? Is not the treaty, in both instances, equally construed, and the title of the party, in reference to the treaty, equally ascertained and decided? Nor does the clause relied on in the objection impugn this construction. It requires that the error, upon which the appellate court is to decide, shall appear on the face of the record, and immediately respect the questions before mentioned in the section. One of the questions is as to the construction of a treaty upon a title specially set up by a party, and every error that immediately respects that question must, of course, be within the cognizance of the court. The title set up in this case is apparent upon the face of the record, and immediately respects the decision of that question; any error, therefore, in respect to that title must be re-examinable, or the case could never be presented to the court.

The restraining clause was manifestly intended for a very different purpose. It was foreseen, that the parties might claim under various titles, and might assert various defences, altogether independent of each other. The court might admit or reject evidence applicable to one particular title, and not to all; and in such cases it was the intention of congress to limit what would otherwise have unquestionably attached to the court, the right of revising all the points involved in the cause. It therefore restrains this right to such errors as respect the questions

1 Wh. 358.

specified in the section; and in this view it has an appropriate sense, consistent with the preceding clauses. We are, therefore, satisfied, that, upon principle, the case was rightly before us, and if the point were perfectly new, we should not hesitate to assert the jurisdiction.

But the point has been already decided by this court upon solemn argument. In *Smith* v. *The State of Maryland* (6 Cranch's Reports, 286) precisely the same objection was taken by counsel, and overruled by the unanimous opinion of the court. That case was, in some respects, stronger than the present; for the court below decided, expressly, that the party had no title, and, therefore, the treaty could not operate upon it. This court entered into an examination of that question, and, being of the same opinion, affirmed the judgment. There cannot, then, be an authority which could more completely govern the present question.

It has been asserted at the bar, that, in point of fact, the court of appeals did not decide either upon the treaty or the title apparent upon the record, but upon a compromise made under an act of the legislature of Virginia. If it be true, (as we are informed,) that this was a private act, to take effect only upon a certain condition, namely, the execution of a deed of release of certain lands, which was matter *in pais*, it is somewhat difficult to understand how the court could take judicial cognizance of the act, or of the performance of the condition, unless spread upon the record. At all events, we are bound to consider that the court did decide upon the facts actually before them. The treaty of peace was not necessary to have been stated, for it was the supreme law of the land, of which all courts must take notice. And at the time of the decision in the court of appeals and in this court another treaty had intervened, which attached itself to the title in controversy, and, of course, must have been the supreme law to govern the decision, if it should be found applicable to the case. It was in this view, that this court did not deem it necessary to rest its former decis-

ion upon the treaty of peace, believing that the title of the defendant was, at all events, perfect under the treaty of 1794.

The remaining questions respect more the practice than the principles of this court. The forms of process and the modes of proceeding in the exercise of jurisdiction are, with few exceptions, left by the legislature to be regulated and changed as this court may, in its discretion, deem expedient. By a rule of this court, the return of a copy of a record of the proper court, under the seal of that court annexed to the writ of error, is declared to be "a sufficient compliance with the mandate of the writ." The record, in this case, is duly certified by the clerk of the court of appeals, and annexed to the writ of error. The objection, therefore, which has been urged to the sufficiency of the return, cannot prevail.

Another objection is, that it does not appear, that the judge who granted the writ of error did, upon issuing the citation, take the bond required by the twenty-second section of the judiciary act.

We consider that provision as merely directory to the judge; and that an omission does not avoid the writ of error. If any party be prejudiced by the omission, this court can grant him summary relief, by imposing such terms on the other party as, under all the circumstances, may be legal and proper. But there is nothing in the record by which we can judicially know whether a bond has been taken or not; for the statute does not require the bond to be returned to this court, and it might, with equal propriety, be lodged in the court below, who would ordinarily execute the judgment to be rendered on the writ. And the presumption of law is, until the contrary appears, that every judge who signs a citation has obeyed the injunctions of the act.

We have thus gone over all the principal questions in the cause, and we deliver our judgment with entire confidence that it is consistent with the constitution and laws of the land.

We have not thought it incumbent on us to give any opinion upon the question, whether this court have authority to issue

1 Wh. 361.

a writ of mandamus to the court of appeals to enforce judgments, as we do not think it necessarily invol decision of this cause.

It is the opinion of the whole court, that the judg court of appeals of Virginia, rendered on the man cause, be reversed, and the judgment of the district at Winchester be, and the same is hereby, affirmed.

THE BANK OF COLUMBIA v. OKELY.

FEBRUARY TERM, 1819.

[4 Wheaton's Reports, 235–246.]

Maryland in 1793 incorporated the Bank of Columbia, and gave it the power of obtaining an execution against its debtors without a trial and judgment. Okely, a debtor, had execution issued against him by the bank, which it was moved to quash as being contrary to the constitutions both of Maryland and the United States, which secure the right of trial by jury. The circuit court for the district of Columbia quashed the writ, and the bank sued out their writ of error. Judge Johnson delivered the opinion of the court as follows: —

In this case the defendant contended that his right to a trial by jury, as secured to him by the constitution of the United States, and of the state of Maryland, has been violated. The question is one of the deepest interest; and if the complaint be well founded, the claims of the citizen on the protection of this court are peculiarly strong.

The seventh amendment of the constitution of the United States is in these words: —

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of the trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

The twenty-first article of the declaration of rights of the state of Maryland is in the words of Magna Charta: —

"No freeman ought to be taken or imprisoned, &c., or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land."

The act by which this bank is incorporated gives a summary

remedy for the recovery of notes endorsed to it, provided those notes be made expressly negotiable at the bank in their creation. This is a note of that description; but it is contended, that the act authorizing the issuing of an execution, either against the body or effects of the debtor, without the judgment of a court, upon the oath and demand of the president of the bank, is so far a violation of the rights intended to be secured to the individual, under the constitution of the United States, and of the state of Maryland. And as the clause in the act of incorporation, under which this execution issued, is express as to the courts in which it is to be executed, it is farther contended, that there is no provision in the law of congress for executing it in this district.

We readily admit that the provisions of this law are in derogation of the ordinary principles of private rights, and, as such, must be subjected to a strict construction; and, under the influence of this admission, will proceed to consider the several questions which the case presents.

The laws of the state of Maryland derive their force in this district under the first section of the act of congress of the 27th of February, 1801. But we cannot admit that the section which gives effect to those laws amounts to a re-enactment of them, so as to sustain them, under the powers of exclusive legislation given to congress over this district. The words of the act are, "The laws of the state of Maryland, as they now exist, shall be and continue in force in that part of the said district which was ceded by that state to the United States." These words could only give to those laws that force which they previously had in this tract of territory under the laws of Maryland; and if this law was unconstitutional in that state, it was void there, and must be so here. It becomes, then, unnecessary to examine the question, whether the powers of congress be despotic in this district, or whether there are any, and what, restrictions imposed upon it, by natural reason, the principles of the social compact, or constitutional provisions.

Was this act void, as a law of Maryland? If it was, it must

have become so under the restrictions of the constitution of the state, or of the United States. What was the object of those restrictions? It could not have been to protect the citizen from his own acts, for it would then have operated as a restraint upon his rights. It must have been against the acts of others. But to constitute particular tribunals for the adjustment of controversies among them, to submit themselves to the exercise of summary remedies, or to temporary privation of rights of the deepest interest, are among the common incidents of life. Such are submissions to arbitration; such are stipulation bonds, forthcoming bonds, and contracts of service. And it was with a view to the voluntary acquiescence of the individual, nay, the solicited submission to the law of the contract, that this remedy was given. By making the note negotiable at the Bank of Columbia the debtor chose his own jurisdiction; in consideration of the credit given him, he voluntarily relinquished his claims to the ordinary administration of justice, and placed himself only in the situation of an hypothecator of goods, with power to sell on default, or a stipulator in the admiralty, whose voluntary submission to the jurisdiction of that court subjects him to personal coercion. It is true, cases may be supposed in which the policy of a country may set bounds to the relinquishment of private rights. And this court would ponder long before it would sustain this action, if we could be persuaded that the act in question produced a total prostration of the trial by jury, or even involved the defendant in circumstances which rendered that right unavailing for his protection. But a power is reserved to the judges, to make such rules and orders "as that justice may be done;" and as the possession of judicial power imposes an obligation to exercise it, we flatter ourselves, that, in practice, the evils so eloquently dilated on by the counsel do not exist. And if the defendant does not avail himself of the right given him, of having an issue made up, and the trial by jury, which is tendered to him by the act, it is presumable that he cannot dispute the justice of the claim. That this view of the subject is giving full effect to the seventh amendment of the

4 Wh. 243.

constitution is not only deducible from the general intent, but from the express wording, of the article referred to. Had the terms been, that "the trial by jury shall be preserved," it might have been contended that they were imperative, and could not be dispensed with. But the words are, that "the right of the trial by jury shall be preserved," which places it on the foot of a *lex pro see introducta*, and the benefit of it may, therefore, be relinquished. As to the words from Magna Charta, incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice. With this explanation, there is nothing left to this individual to complain of. What he has lost he has voluntarily relinquished, and the trial by jury is open to him, either to arrest the progress of the law in the first instance, or to obtain redress for oppression, if the power of the bank has been abused. The same answer is equally applicable to the argument founded on the third article of the Maryland constitution.

In giving this opinion we attach no importance to the idea of this being a chartered right in the bank. It is the remedy, and not the right; and, as such, we have no doubt of its being subject to the will of congress. The forms of administering justice, and the duties and powers of courts as incident to the exercise of a branch of sovereign power, must ever be subject to legislative will, and the power over them is unalienable, so as to bind subsequent legislatures. This subject came under consideration in the case of *Young* v. *The Bank of Alexandria*, (4 Cranch's Reports, 384,) and it was so decided.

The next question is, whether the courts of this district are empowered to carry into effect the summary remedy given to the bank in this case?

The law requires the application for process to be made to the clerk of the general court, or of the county court for the

county in which the delinquent resides, and obliges such clerk to issue the execution, returnable to the court to which such clerk is attached. Unless, therefore, the clerk of this district is vested with the same power, and the courts with jurisdiction over the case, the bank would not have the means of resorting to this remedy.

The third section of the act of February, 1801, does not vest in the courts that power. It only clothes the courts and judges of this district with the jurisdiction and powers of the circuit courts and judges of the United States. But we are of opinion that this defect is supplied by the fifth section of the same act, taken in connexion with the fifth section of the act of March 3d, 1801. By the former section the courts of the district are vested generally with jurisdiction of all causes in law and equity; and by the latter the clerks of the circuit court are required to perform all the services then performed by the clerks of the counties of the state of Maryland. Among those services is that of instituting a judicial proceeding in favor of this bank, and the return of that process is required to be to the court with which such clerk is connected. That court has jurisdiction of all cases in law arising in this district, and thus the suit is instituted by the proper officer, by writ returnable to a court having a jurisdiction communicated by terms which admit of no exception.

Upon the whole, we are of opinion that the law is constitutional, and the jurisdiction vested in the courts of the district; and, therefore, that the judgment must be reversed, and the cause remanded for further proceedings.

4 Wh. 246.

HOUSTON *v.* MOORE.

FEBRUARY TERM, 1820.

[5 Wheaton's Reports, 1-76.]

Congress, under the authority over the militia given it by the constitution passed certain laws fining delinquents, and providing that they should be tried by a court martial. Pennsylvania also passed laws providing for the trial of delinquents by a state court martial. Houston, when the militia of Pennsylvania was called out by the president, did not go; he was then tried under the state law and fined; when this fine was collected he sued the marshal, on the ground that the state laws clashed with those of congress, and were, therefore, unconstitutional. The judge of the state court where the suit was brought decided against Houston, however; which decision was confirmed by the supreme court of Pennsylvania, from which a writ of error was taken to the supreme court of the United States.

In the following opinions the laws in question are sufficiently rehearsed to make the points intelligible. The opinion of the court was delivered by Judge Washington as follows: —

There is but one question in this cause, and it is, whether the act of the legislature of Pennsylvania, under the authority of which the plaintiff in error was tried, and sentenced to pay a fine, is repugnant to the constitution of the United States, or not?

But before this question can be clearly understood it will be necessary to inquire, 1. What are the powers granted to the general government, by the constitution of the United States, over the militia? and, 2. To what extent have they been assumed and exercised?

1. The constitution declares that congress shall have power to provide for calling forth the militia in three specified cases:

for organizing, arming, and disciplining them; and for governing such part of them as may be employed in the service of the United States; reserving to the states, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress. It is further provided, that the president of the United States shall be commander of the militia, when called into the actual service of the United States.

2. After the constitution went into operation, congress proceeded by many successive acts to exercise these powers, and to provide for all the cases contemplated by the constitution.

The act of the 2d of May, 1792, which is re-enacted almost verbatim by that of the 28th of February, 1795, authorizes the president of the United States, in case of invasion, or of imminent danger of it, or when it may be necessary for executing the laws of the United States, or to suppress insurrections, to call forth such number of the militia of the states most convenient to the scene of action as he may judge necessary, and to issue his orders for that purpose to such officer of the militia as he shall think proper. It prescribes the amount of pay and allowances of the militia so called forth and employed in the service of the United States, and subjects them to the rules and articles of war applicable to the regular troops. It then proceeds to prescribe the punishment to be inflicted upon delinquents, and the tribunal which is to try them, by declaring that every officer or private, who should fail to obey the orders of the president, in any of the cases before recited, should be liable to pay a certain fine, to be determined and adjudged by a court martial, and to be imprisoned, by a like sentence, on failure of payment. The courts martial for the trial of militia are to be composed of militia officers only, and the fines to be certified by the presiding officer of the court to the marshal of the district, and to be levied by him, and, also, to the supervisor, to whom the fines are to be paid over.

The act of the 18th of April, 1814, provides that courts martial, to be composed of militia officers only, for the trial of militia

drafted, detached, and called forth for the service of the United States, whether acting in conjunction with the regular forces or otherwise, shall, whenever necessary, be appointed, held, and conducted, in the manner prescribed by the rules and articles of war, for appointing, holding, and conducting courts martial for the trial of delinquents in the army of the United States. Where the punishment prescribed is by stoppage of pay, or imposing a fine limited by the amount of pay, the same is to have relation to the monthly pay existing at the time the offence was committed. The residue of the act is employed in prescribing the manner of conducting the trial; the rules of evidence for the government of the court; the time of service, and other matters not so material to the present inquiry. The only remaining act of congress, which it will be necessary to notice in this general summary of the laws, is that of the 8th of May, 1792, for establishing a uniform militia in the United States. It declares who shall be subject to be enrolled in the militia, and who shall be exempt; what arms and accoutrements the officers and privates shall provide themselves with; arranges them into divisions, brigades, regiments, battalions, and companies, in such manner as the state legislatures may direct; declares the rules of discipline by which the militia is to be governed, and makes provision for such as should be disabled whilst in the actual service of the United States. The pay and subsistence of the militia, whilst in service, are provided for by other acts of congress, and particularly by one passed on the third of January, 1795.

The laws which I have referred to amount to a full execution of the powers conferred upon congress by the constitution. They provide for calling forth the militia to execute the laws of the union, suppress insurrections, and repel invasions. They also provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States; leaving to the states respectively the appointment of the officers, and the authority of training them according to the discipline prescribed by congress.

This system may not be formed with as much wisdom as, in

the opinion of some, it might have been, or, as time and experience may hereafter suggest. But to my apprehension, the whole ground of congressional legislation is covered by the laws referred to. The manner, in which the militia is to be organized, armed, disciplined, and governed, is fully prescribed. Provisions are made for drafting, detaching, and calling forth the state quotas, when required by the president. The president's orders may be given to the chief executive magistrate of the state, or to any militia officer he may think proper. Neglect or refusal to obey orders is declared to be an offence against the laws of the United States, and subjects the offender to trial, sentence, and punishment to be adjudged by a court martial, to be summoned in the way pointed out by the articles and rules of war; and the mode of proceeding to be observed by these courts is detailed with all necessary perspicuity.

If I am not mistaken in this view of the subject, the way is now open for the examination of the great question in the cause. Is it competent to a court martial, deriving its jurisdiction under state authority, to try and to punish militia-men, drafted, detached, and called forth by the president into the service of the United States, who have refused or neglected to obey the call?

In support of the judgment of the court below, I understand the leading arguments to be the two following. 1. That militia-men, when called into the service of the United States by the president's orders, communicated either to the executive magistrate, or to any inferior militia officer of a state, are not to be considered as being in the service of the United States until they are mustered at the place of rendezvous. If this be so, then, 2dly, The state retains a right, concurrent with the government of the United States, to punish his delinquency. It is admitted on the one side, that, so long as the militia are acting under the military jurisdiction of the state to which they belong, the powers of legislation over them are concurrent in the general and state government. Congress has power to provide for organizing, arming, and disciplining them; and this power being unlimited, except in the two particulars of officering and train-

ing them, according to the discipline to be prescribed by congress, it may be exercised to any extent that may be deemed necessary by congress. But as state militia, the power of the state governments to legislate on the same subjects having existed prior to the formation of the constitution, and not having been prohibited by that instrument, it remains with the states, subordinate, nevertheless, to the paramount law of the general government, operating upon the same subject. On the other side, it is conceded, that, after a detachment of the militia have been called forth, and have entered into the service of the United States, the authority of the general government over such detachment is exclusive. This is also obvious. Over the national militia the state governments never had, or could have, jurisdiction. None such is conferred by the constitution of the United States; consequently, none such can exist.

The first question, then, is, at what time, and under what circumstances, does a portion of militia, drafted, detached, and called forth by the president, enter into the service of the United States, and change their character from state to national militia? That congress might by law have fixed the period, by confining it to the draft; to the order given to the chief magistrate, or other militia officer of the state; to the arrival of the men at the place of rendezvous; or to any other circumstance, I can entertain no doubt. This would certainly be included in the more extensive powers of calling forth the militia, organizing, arming, disciplining, and governing them. But has congress made any declaration on this subject? and in what manner is the will of that body, as expressed in the before-mentioned laws, to be construed? It must be conceded that there is no law of the United States which declares, in express terms, that the organizing, arming, and equipping a detachment, on the order of the president to the state militia officers, or to the militia-men personally, places them in the service of the United States. It is true, that the refusal or neglect of the militia to obey the orders of the president is declared to be an offence against the United States, and subjects the offender to a certain prescribed punish-

ment. But this flows from the power bestowed upon the general government to call them forth, and, consequently, to punish disobedience to a legal order; and by no means proves that the call of the president places the detachment in the service of the United States. But although congress has been less explicit on this subject than they might have been, and, it could be wished they had been, I am, nevertheless, of opinion, that a fair construction of the different militia laws of the United States will lead to a conclusion, that something more than organizing and equipping a detachment and ordering it into service was considered as necessary to place the militia in the service of the United States. That preparing a detachment for such service does not place it in the service is clearly to be collected from the various temporary laws which have been passed, authorizing the president to require of the state executives to organize, arm, and equip their state quotas of militia for the service of the United States; because they all provide that the requisition shall be to hold such quotas in readiness to march at a moment's warning; and some, if not all of them, authorize the president to call into actual service any part, or the whole, of said quotas, or detachments; clearly distinguishing between the orders of the president to organize and hold the detachments in readiness for service, and their entering into service.

The act of the 28th of February, 1795, declares that the militia employed in the service of the United States shall receive the same pay and allowance as the troops of the United States, and shall be subject to the same rules and articles of war. The provisions made for disabled militia-men, and for their families, in case of their death, are, by other laws, confined to such militia as are, or have been, in actual service. There are other laws which seem very strongly to indicate the time at which they are considered as being in service. Thus, the act of the 28th of February, 1795, declares that a militia-man called into the service of the United States shall not be compelled to serve more than three months, after his arrival at the place of rendezvous, in any one year. The 8th section of the act of the 18th of April, 1814, de-

clares that the militia, when called into the service of the United States, if, in the president's opinion, the public interest requires it, may be compelled to serve for a term not exceeding six months after their arrival at the place of rendezvous, in any one year; and by the 10th section provision is made for the expenses which may be incurred by marching the militia to their places of rendezvous, in pursuance of a requisition of the president, and they are to be adjusted and paid in like manner as those incurred after their arrival at the rendezvous. The 3d section of the act of the 2d of January, 1795, provides, that, whenever the militia shall be called into the actual service of the United States, their pay shall be deemed to commence from the day of their appearing at the place of battalion, regimental, or brigade rendezvous, allowing a day's pay and ration for every fifteen miles from their homes to said rendezvous.

From this brief summary of the laws it would seem, that actual service was considered by congress as the criterion of national militia; and that the service did not commence until the arrival of the militia at the place of rendezvous. That is the *terminus a quo* the service, the pay, and subjection to the articles of war, are to commence and continue. If the service, in particular, is to continue for a certain length of time, from a certain day, it would seem to follow, almost conclusively, that the service commenced on that, and not on some prior day. And, indeed, it would seem to border somewhat upon an absurdity to say that a militia-man was in the service of the United States at any time, who, so far from entering into it for a single moment, had refused to do so, and who never did any act to connect him with such service. It has already been admitted, that, if congress had pleased so to declare, a militia-man, called into the service of the United States, might have been held and considered as being constructively in that service, though not actually so; and might have been treated in like manner as if he had appeared at the place of rendezvous. But congress has not so declared, nor have they made any provision applicable to such a case; on the contrary, it would appear, that a fine to be paid by the delinquent

militia-man was deemed an equivalent for his services, and an atonement for his disobedience.

If, then, a militia-man, called into the service of the United States, shall refuse to obey the order, and is, consequently, not to be considered as in the service of the United States, or removed from the military jurisdiction of the state to which he belongs, the next question is, Is it competent to the state to provide for trying and punishing him for his disobedience by a court martial deriving its authority under the state? It may be admitted at once, that the militia belong to the states, respectively, in which they are enrolled, and that they are subject both in their civil and military capacities, to the jurisdiction and laws of such state, except so far as those laws are controlled by acts of congress constitutionally made. Congress has power to provide for organizing, arming, and disciplining the militia: and it is presumable, that the framers of the constitution contemplated a full exercise of all these powers. Nevertheless, if congress has declined to exercise them, it was competent to the state governments to provide for organizing, arming, and disciplining their respective militia in such manner as they might think proper. But congress has provided for all these subjects, in the way which that body must have supposed the best calculated to promote the general welfare, and to provide for the national defence. After this, can the state governments enter upon the same ground,—provide for the same objects as they may think proper, and punish in their own way violations of the laws they have so enacted? The affirmative of this question is asserted by the defendant's counsel, who, it is understood, contend, that, unless such state laws are in direct contradiction to those of the United States, they are not repugnant to the constitution of the United States.

From this doctrine I must, for one, be permitted to dissent. The two laws may not be in such absolute opposition to each other as to render the one incapable of execution without violating the injunctions of the other; and yet, the will of the one legislature may be in direct collision with that of the other.

5 Wh. 21.

This will is to be discovered as well by what the legislature has not declared as by what they have expressed. Congress, for example, has declared that the punishment for disobedience of the act of congress shall be a certain fine; if that provided by the state legislature for the same offence be a similar fine, with the addition of imprisonment or death, the latter law would not prevent the former from being carried into execution, and may be said, therefore, not to be repugnant to it. But, surely, the will of congress is, nevertheless, thwarted and opposed.

This question does not so much involve a contest for power between the two governments as the rights and privileges of the citizen, secured to him by the constitution of the United States, the benefit of which he may lawfully claim.

If, in a specified case the people have thought proper to bestow certain powers on congress as the safest depository of them, and congress has legislated within the scope of them, the people have reason to complain that the same powers should be exercised at the same time by the state legislatures. To subject them to the operation of two laws upon the same subject, dictated by distinct wills, particularly in a case inflicting pains and penalties, is, to my apprehension, something very much like oppression, if not worse. In short, I am altogether incapable of comprehending how two distinct wills can, at the same time, be exercised in relation to the same subject, to be effectual, and at the same time compatible with each other. If they correspond in every respect, then the latter is idle and inoperative; if they differ, they must, in the nature of things, oppose each other, so far as they do differ. If the one imposes a certain punishment for a certain offence, the presumption is, that this was deemed sufficient, and, under all circumstances, the only proper one. If the other legislature impose a different punishment, in kind or degree, I am at a loss to conceive how they can both consist harmoniously together.

I admit that a legislative body may, by different laws, impose upon the same person, for the same offence, different and cumulative punishments; but then it is the will of the same body to

do so, and the second, equally with the first law, is the will of that body. There is, therefore, and can be, no opposition of wills. But the case is altogether different where the laws flow from the wills of distinct, co-ordinate bodies.

This course of reasoning is intended as an answer to what I consider a novel and unconstitutional doctrine, that, in cases where the state governments have a concurrent power of legislation with the national government, they may legislate upon any subject on which congress has acted, provided the two laws are not in terms, or in their operation, contradictory and repugnant to each other.

Upon the subject of the militia, congress has exercised the powers conferred on that body by the constitution, as fully as was thought right, and has thus excluded the power of legislation by the states on these subjects, except so far as it has been permitted by congress; although, it should be conceded, that important provisions have been omitted, or that others which have been made might have been more extended, or more wisely devised.

There still remains another question to be considered, which more immediately involves the merits of this cause. Admit that the legislature of Pennsylvania could not constitutionally legislate in respect to delinquent militia-men, and to prescribe the punishment to which they should be subject; had the state court martial jurisdiction over the subject, so as to enforce the laws of congress against these delinquents?

This, it will be seen, is a different question from that which has been just examined. That respects the power of a state legislature to legislate upon a subject on which congress has declared its will. This concerns the jurisdiction of a state military tribunal to adjudicate in a case which depends on a law of congress, and to enforce it.

It has been already shown, that congress has prescribed the punishment to be inflicted on a militia-man detached and called forth, but who has refused to march; and has also provided that courts martial for the trial of such delinquents, to be composed

of militia officers only, shall be held and conducted in the manner pointed out by the rules and articles of war.

That congress might have vested the exclusive jurisdiction in courts martial to be held and conducted as the laws of the United States have prescribed, will, I presume, hardly be questioned. The offence to be punished grows out of the constitution and laws of the United States, and is, therefore, clearly a case which might have been withdrawn from the concurrent jurisdiction of the state tribunals. But an exclusive jurisdiction is not given to courts martial deriving their authority under the national government, by express words;—the question, then, (and I admit the difficulty of it,) occurs, Is this a case in which the state courts martial could exercise jurisdiction?

Speaking upon the subject of the federal judiciary, "The Federalist" distinctly asserts the doctrine, that the United States, in the course of legislation upon the objects entrusted to their discretion, may commit the decision of causes arising upon a particular regulation to the federal courts solely, if it should be deemed expedient; yet, that, in every case, in which the state tribunals should not be expressly excluded by the acts of the national legislature, they would, of course, take cognizance of the causes to which those acts might give birth.*

I can discover, I confess, nothing unreasonable in this doctrine; nor can I perceive any inconvenience which can grow out of it, so long as the power of congress to withdraw the whole or any part of those cases from the jurisdiction of the state courts is, as I think it must be, admitted.

The practice of the general government seems strongly to confirm this doctrine; for at the first session of congress which commenced after the adoption of the constitution the judicial system was formed; and the exclusive and concurrent jurisdiction conferred upon the courts created by that law were clearly distinguished and marked; showing, that, in the opinion of that body, it was not sufficient to vest an exclusive jurisdiction,

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*Letters of *Publius*, or *The Federalist;* No. 82.

where it was deemed proper, merely by a grant of jurisdiction generally. In particular, this law grants exclusive jurisdiction to the circuit courts of all crimes and offences cognizable under the authority of the United States, except where the laws of the United States should otherwise provide; and this will account for the proviso in the act of the 24th of February, 1807, (chapter 75,) concerning the forgery of the notes of the bank of the United States, "that nothing in that act contained should be construed to deprive the courts of the individual states of jurisdiction, under the laws of the several states, over offences made punishable by that act." A similar proviso is to be found in the act of the 21st of April, 1806, (chapter 49,) concerning the counterfeiters of the current coin of the United States. It is clear, that, in the opinion of congress, this saving was necessary in order to authorize the exercise of concurrent jurisdiction by the state courts over those offences; and there can be very little doubt but that this opinion was well founded. The judiciary act had vested in the federal courts exclusive jurisdiction of all offences cognizable under the authority of the United States, unless where the laws of the United States should otherwise direct. The states could not, therefore, exercise a concurrent jurisdiction in those cases, without coming into direct collision with the laws of congress. But by these savings congress did provide that the jurisdiction of the federal courts in the specified cases should not be exclusive; and the concurrent jurisdiction of the state courts was instantly restored, so far as, under state authority, it could be exercised by them.

There are many other acts of congress which permit jurisdiction over the offences therein described to be exercised by state magistrates and courts; not, I presume, because such permission was considered to be necessary under the constitution, in order to vest a concurrent jurisdiction in those tribunals; but because, without it, the jurisdiction was exclusively vested in the national courts by the judiciary act, and, consequently, could not be otherwise exercised by the state courts. For I hold it to be perfectly clear, that congress cannot confer jurisdiction upon

any courts but such as exist under the constitution and laws of the United States, although the state courts may exercise jurisdiction in cases authorized by the laws of the state, and not prohibited by the exclusive jurisdiction of the federal courts.

What, then, is the real object of the law of Pennsylvania which we are considering? I answer, to confer authority upon a state court martial to enforce the laws of the United States against delinquent militia-men who had disobeyed the call of the president to enter into the service of the United States; for, except the provisions for vesting this jurisdiction in such a court, this act is, in substance, a re-enactment of the acts of congress, as to the description of the offence, the nature and extent of the punishment, and the collection and appropriation of the fines imposed.

Why might not this court martial exercise the authority thus vested in it by this law? As to crimes and offences against the United States, the law of congress had vested the cognizance of them exclusively in the federal courts. The state courts, therefore, could exercise no jurisdiction whatever over such offences, unless where, in particular cases, other laws of the United States had otherwise provided; and wherever such provision was made, the claim of exclusive jurisdiction to the particular cases was withdrawn by the United States, and the concurrent jurisdiction of the state courts was *eo instanti* restored, not by way of grant from the national government, but by the removal of a disability before imposed upon the state tribunals.

But military offences are not included in the act of congress conferring jurisdiction upon the circuit and district courts; no person has ever contended that such offences are cognizable before the common law courts. The militia laws have, therefore, provided that the offence of disobedience to the president's call upon the militia shall be cognizable by a court martial of the United States; but an exclusive cognizance is not conferred upon that court, as it had been upon the common law courts as to other offences, by the judiciary act. It follows, then, as I conceive, that jurisdiction over this offence remains to be con-

currently exercised by the national and state courts martial, since it is authorized by the laws of the state, and not prohibited by those of the United States. Where is the repugnance of the one law to the other? The jurisdiction was clearly concurrent over militia-men not engaged in the service of the United States; and the acts of congress have not disturbed this state of things by asserting an exclusive jurisdiction. They certainly have not done so in terms; and I do not think that it can be made out by any fair construction of them. The act of 1795 merely declares that this offence shall be tried by a court martial. This was clearly not exclusive; but, on the contrary, it would seem to import that such court might be held under national or state authority.

The act of 1814 does not render the jurisdiction necessarily exclusive. It provides that courts martial for the trial of militia, drafted and called forth, shall, when necessary, be appointed, held and conducted, in the manner prescribed by the rules of war.

If the mere assignment of jurisdiction to a particular court does not necessarily render it exclusive, as I have already endeavored to prove, then it would follow that this law can have no such effect; unless, indeed, there is a difference in this respect between the same language, when applied to military and to civil courts; and if there be a difference, I have not been able to perceive it. But the law uses the expression "when necessary." How is this to be understood? It may mean, I acknowledge, whenever there are delinquents to try; but, surely, if it import no more than this, it was very unnecessarily used, since it would have been sufficient to say that courts martial for the trial of militia called into service should be formed and conducted in the manner prescribed by the law. The act of 1795 had declared who were liable to be tried, but had not said with precision before what court the trial should be had. This act describes the court; and the two laws being construed together would seem to mean that every such delinquent as is described in the act of 1795 should pay a certain fine, to be determined

and adjudged by a court martial, to be composed of militia officers, to be appointed and conducted in the manner prescribed by the articles of war. These words, "when necessary," have no definite meaning, if they are confined to the existence of cases for trial before the court. But if they be construed (as I think they ought to be) to apply to trials rendered necessary by the omission of the states to provide for state courts martial to exercise a jurisdiction in the case, or of such courts to take cognizance of them when so authorized, they have an important and a useful meaning. If the state court martial proceeds to take cognizance of the cases, it may not appear necessary to the proper officer in the service of the United States to summon a court to try the same cases; if they do not, or for want of authority cannot try them, then it may be deemed necessary to convene a court martial under the articles of war, to take and to exercise the jurisdiction.

There are two objections which were made by the plaintiff's counsel to the exercise of jurisdiction in this case by the state court martial, which remain to be noticed.

1. It was contended, that, if the exercise of this jurisdiction be admitted, the sentence of the court would either oust the jurisdiction of the United States court martial, or might subject the accused to be twice tried for the same offence. To this I answer, that, if the jurisdiction of the two courts be concurrent, the sentence of either court, either of conviction or acquittal, might be pleaded in bar of the prosecution before the other, as much so as the judgment of a state court, in a civil case of concurrent jurisdiction, may be pleaded in bar of an action for the same cause instituted in a circuit court of the United States.

Another objection is, that, if the state court martial had authority to try these men, the governor of that state, in case of conviction, might have pardoned them. I am by no means satisfied that he could have done so; but if he could, this would only furnish a reason why congress should vest the jurisdiction in these cases exclusively in a court martial acting under the authority of the United States.

Upon the whole, I am of opinion, after the most laborious examination of this delicate question, that the state court martial had a concurrent jurisdiction with the tribunal pointed out by the acts of congress to try a militia-man who had disobeyed the call of the president, and to enforce the laws of congress against such delinquent; and that this authority will remain to be so exercised until it shall please congress to vest it exclusively elsewhere, or until the state of Pennsylvania shall withdraw from their court martial the authority to take such jurisdiction. At all events, this is not one of those clear cases of repugnance to the constitution of the United States, where I should feel myself at liberty to declare the law to be unconstitutional, the sentence of the court *coram non judice*, and the judgment of the supreme court of Pennsylvania erroneous on these grounds.

Two of the judges are of opinion that the law in question is unconstitutional, and that the judgment below ought to be reversed.

The other judges are of opinion that the judgment ought to be affirmed; but they do not concur in all respects in the reasons which influence my opinion.

We subjoin the dissenting opinion of Judge Story :—

The only question which is cognizable by this court, upon this voluminous record, arises from a very short paragraph in the close of the bill of exceptions. It there appears, that the plaintiff prayed the state court of common pleas to instruct the jury that the first, second, and third paragraphs of the twenty-first section of the statute of Pennsylvania of the 28th of March, 1814, "so far as they related to the militia called into the service of the United States, under the laws of congress, and who failed to obey the orders of the president of the United States, are contrary to the constitution of the United States and the laws of congress made in pursuance thereof, and are, there-

5 Wh. 32.

fore, null and void." The court instructed the jury that these paragraphs were not contrary to the constitution or laws of the United States, and were, therefore, not null and void. This opinion has been affirmed by the highest state tribunal of Pennsylvania, and judgment has been there pronounced in pursuance of it in favor of the defendant. The cause stands before us upon a writ of error from this last judgment; and the naked question for us to decide is, whether the paragraphs alluded to are repugnant to the constitution or laws of the United States; if so, the judgment must be reversed; if otherwise, it ought to be affirmed.

Questions of this nature are always of great importance and delicacy. They involve interests of so much magnitude, and of such deep and permanent public concern, that they cannot but be approached with uncommon anxiety. The sovereignty of a state in the exercise of its legislation is not to be impaired, unless it be clear that it has transcended its legitimate authority; nor ought any power to be sought, much less to be adjudged, in favor of the United States, unless it be clearly within the reach of its constitutional charter. Sitting here, we are not at liberty to add one jot of power to the national government beyond what the people have granted by the constitution; and, on the other hand, we are bound to support that constitution as it stands, and to give a fair and rational scope to all the powers which it clearly contains.

The constitution containing a grant of powers, in many instances similar to those already existing in the state governments, and some of these being of vital importance also to state authority and state legislation, it is not to be admitted, that a mere grant of such powers in affirmative terms to congress does, *per se*, transfer an exclusive sovereignty on such subjects to the latter. On the contrary, a reasonable interpretation of that instrument necessarily leads to the conclusion, that the powers so granted are never exclusive of similar powers existing in the states, unless where the constitution has expressly in terms given an exclusive power to congress, or the exercise of a like

power is prohibited to the states, or there is a direct repugnancy or incompatibility in the exercise of it by the states. The example of the first class is to be found in the exclusive legislation delegated to congress over places purchased, by the consent of the legislature of the state in which the same shall be, for forts, arsenals, dock-yards, &c.; of the second class, the prohibition of a state to coin money or emit bills of credit; of the third class, as this court have already held, the power to establish a uniform rule of naturalization,* and the delegation of admiralty and maritime jurisdiction.† In all other cases, not falling within the classes already mentioned, it seems unquestionable, that the states retain concurrent authority with congress, not only upon the letter and spirit of the eleventh amendment of the constitution, but upon the soundest principles of general reasoning. There is this reserve, however, that, in cases of concurrent authority, where the laws of the states and of the union are in direct and manifest collision on the same subject, those of the union being "the supreme law of the land" are of paramount authority, and the state laws, so far, and so far only, as such incompatibility exists, must necessarily yield.

Such are the general principles by which my judgment is guided in every investigation on constitutional points. I do not know that they have ever been seriously doubted. They commend themselves by their intrinsic equity, and have been amply justified by the opinions of the great men under whose guidance the constitution was framed, as well as by the practice of the government of the union. To desert them would be to deliver ourselves over to endless doubts and difficulties; and, probably, to hazard the existence of the constitution itself. With these principles in view, let the question now before the court be examined.

The constitution declares that congress shall have power "to provide for calling forth the militia to execute the laws of the

* *Chirac* v. *Chirac*, 2 Wheaton's Reports, 259, 269.

† *Martin* v. *Hunter*, 1 Wheaton's Reports, 304, 337. And see *The Federalist*, No. 32.

union, suppress insurrections, and repel invasions;" and "to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress."

It is almost too plain for argument that the power here given to congress over the militia is of a limited nature, and confined to the objects specified in these clauses; and that, in all other respects, and for all other purposes, the militia are subject to the control and government of the state authorities. Nor can the reservation to the states of the appointment of the officers, and of the authority of training the militia according to the discipline prescribed by congress, be justly considered as weakening this conclusion. That reservation constitutes an exception merely from the power given to congress "to provide for organizing, arming, and disciplining the militia;" and is a limitation upon the authority which would otherwise have devolved upon it as to the appointment of officers. But the exception from a given power cannot, upon any fair reasoning, be considered as an enumeration of all the powers which belong to the states over the militia. What those powers are must depend upon their own constitutions; and what is not taken away by the constitution of the United States must be considered as retained by the states or the people. The exception, then, ascertains only that congress have not, and that the states have, the power to appoint the officers of the militia, and to train them according to the discipline prescribed by congress. Nor does it seem necessary to contend that the power "to provide for organizing, arming, and disciplining the militia" is exclusively vested in congress. It is merely an affirmative power, and if not in its own nature incompatible with the existence of a like power in the states, it may well leave a concurrent power in the latter. But when once congress has carried this power into effect, its laws for the organization, arming, and discipline of the militia are the supreme law of the land; and all interfering state regula-

tions must necessarily be suspended in their operation. It would certainly seem reasonable, that, in the absence of all interfering provisions by congress on the subject, the states should have authority to organize, arm, and discipline their own militia. The general authority retained by them over the militia would seem to draw after it these, as necessary incidents. If congress should not have exercised its own power, how, upon any other construction than that of a concurrent power, could the states sufficiently provide for their own safety against domestic insurrection, or the sudden invasion of a foreign enemy? They are expressly prohibited from keeping troops or ships of war in time of peace; and this, undoubtedly, upon the supposition, that, in such cases, the militia would be their natural and sufficient defence. Yet what would the militia be without organization, arms, and discipline? It is certainly not compulsory upon congress to exercise its own authority upon this subject. The time, the mode, and the extent, must rest upon its means and sound discretion. If, therefore, the present case turned upon the question, whether a state might organize, arm, and discipline its own militia, in the absence of, or subordinate to, the regulations of congress, I am certainly not prepared to deny the legitimacy of such an exercise of authority. It does not seem repugnant in its nature to the grant of a like, paramount authority to congress; and if not, then it is retained by the states. The fifth amendment to the constitution, declaring, that, "a well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed," may not, perhaps, be thought to have any important bearing on this point. If it have, it confirms and illustrates, rather than impugns, the reasoning already suggested.

But congress have, also, the power to provide "for governing such part of the militia as may be employed in the service of the United States." It has not been attempted in argument, to establish that this power is not exclusively in congress; or that the states have a concurrent power of governing their own militia

5 Wh. 52.

when in the service of the union. On the contrary, the reverse has been conceded both here and before the other tribunals in which this cause has been so ably and learnedly discussed. And there certainly are the strongest reasons for this construction. When the militia is called into the actual service of the United States, by which I understand actual employment in service, the constitution declares that the president shall be the commander-in-chief. The militia of several states may, at the same time, be called out for the public defence; and to suppose each state could have an authority to govern its own militia in such cases, even subordinate to the regulations of congress, seems utterly inconsistent with that unity of command and action on which the success of all military operations must essentially depend. There never could be a stronger case put, from the argument of public inconvenience, against the adoption of such a doctrine. It is scarcely possible, that any interference, however small, of a state, under such circumstances, in the government of the militia, would not materially embarrass, and directly, or indirectly, impugn the authority of the union. In most cases there would be an utter repugnancy. It would seem, therefore, that a rational interpretation must construe this power as exclusive in its own nature, and belonging solely to congress. The remaining clause gives congress power "to provide for calling forth the militia to execute the laws of the union, suppress insurrections, and repel invasions." Does this clause vest in congress an exclusive power, or leave to the states a concurrent power to enact laws for the same purposes? This is an important question, bearing directly on the case before us, and deserves serious deliberation. The plaintiff contends that the power is exclusive in congress; the defendant, that it is not.

In considering this question it is always to be kept in view, that the case is not of a new power granted to congress where no similar power already existed in the states. On the contrary, the states, in virtue of their sovereignty, possessed general authority over their own militia; and the constitution carved out of that a specific power in certain enumerated cases. But

the grant of such a power is not necessarily exclusive, unless the retaining of a concurrent power by the states be clearly repugnant to the grant. It does not strike me, that there is any repugnancy in such concurrent power in the states. Why may not a state call forth its own militia in aid of the United States, to execute the laws of the union, or suppress insurrections, or repel invasions? It would certainly seem fit that a state might so do, where the insurrection or invasion is within its own territory, and directed against its own existence or authority; and yet these are cases to which the power of congress pointedly applies. And the execution of the laws of the union within its territory may not be less vital to its rights and authority than the suppression of a rebellion, or the repulse of an enemy. I do not say that a state may call forth, or claim under its own command, that portion of its militia which the United States have already called forth, and hold employed in actual service. There would be a repugnancy in the exercise of such an authority under such circumstances. But why may it not call forth and employ the rest of its militia in aid of the United States, for the constitutional purposes? It could not clash with the exercise of the authority confided to congress; and yet that it must necessarily clash with it in all cases is the sole ground upon which the authority of congress can be deemed exclusive. I am not prepared to assert that a concurrent power is not retained by the states to provide for the calling forth of its own militia, as auxiliary to the power of congress, in the enumerated cases. The argument of the plaintiff is, that, when a power is granted to congress to legislate in specific cases, for purposes growing out of the union, the natural conclusion is that the power is designed to be exclusive; that the power is to be exercised for the good of the whole, by the will of the whole, and consistent with the interests of the whole; and that these objects can nowhere be so clearly seen, or so thoroughly weighed, as in congress, where the whole nation is represented. But the argument proves too much; and, pursued to its full extent, it would establish that all the powers granted to congress are exclusive,

5 Wh. 54.

unless where concurrent authority is expressly reserved to the states. But assuming the states to possess a concurrent power on this subject, still the principal difficulty remains to be considered. It is conceded on all sides, and is, indeed, beyond all reasonable doubt, that all state laws on this subject are subordinate to those constitutionally enacted by congress, and that, if there be any conflict or repugnancy between them, the state laws to that extent are inoperative and void. And this brings us to a consideration of the actual leglislation of congress, and of Pennsylvania, as to the point in controversy.

In the execution of the power to provide for the calling forth of the militia, it cannot well be denied, that congress may pass laws to make its call effectual, to punish disobedience to its call, to erect tribunals for the trial of offenders, and to direct the modes of proceeding to enforce the penalties attached to such disobedience. In its very essence, too, the offence created by such laws must be an offence exclusively against the United States, since it grows solely out of the breach of duties due to the United States in virtue of its positive legislation. To deny the authority of congress to legislate to this extent would be to deny that it had authority to make all laws necessary and proper to carry a given power into execution; to require the end, and yet deny the only means adequate to attain that end. Such a construction of the constitution is wholly inadmissible.

The authority of congress being then unquestionable, let us see to what extent and in what manner it has been exercised. By the act of the 28th of February, 1795, (chapter 101,) congress have provided for the calling forth of the militia in the cases enumerated in the constitution. The first section provides, "that, whenever the United States shall be invaded, or be in imminent danger of invasion, from any foreign nation, or Indian tribe, it shall be lawful for the president of the United States to call forth such number of the militia of the state or states, most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasion, and to issue his orders, for that purpose, to such officer or officers of the militia as he

shall think proper." It then proceeds to make a provision substantially the same in cases of domestic insurrections. And in like manner, the second section proceeds to provide for cases where the execution of the laws is opposed or obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings. The fourth section provides that "the militia employed in the service of the United States shall be subject to the same rules and articles of war as the troops of the United States." The fifth section (which is very material to our present purpose) provides "that every officer, non-commissioned officer, or private, of the militia, who shall fail to obey any of the orders of the president of the United States, in the cases before recited, shall forfeit a sum not exceeding one year's pay, and not less than one month's pay, to be determined and adjudged by a court martial; and such officer shall, moreover, be liable to be cashiered by a sentence of a court martial, and be incapacitated from holding a commission in the militia for a term not exceeding twelve months, at the discretion of the said court; and such non-commissioned officers and privates shall be liable to be imprisoned by a like sentence, on failure of payment of the fines adjudged against them, for one calendar month for every five dollars of such fine." The sixth section declares "that courts martial for the trial of militia shall be composed of militia officers only." The seventh and eighth sections provide for the collection of the fines by the marshal and deputies, and for the payment of them, when collected, into the treasury of the United States.

The second section of the militia act of Pennsylvania, passed the 28th of March, 1814, provides, "that, if any commissioned officer of the militia shall have neglected or refused to serve, when called into actual service in pursuance of any order or requisition of the president of the United States, he shall be liable to the penalties defined in the act of congress of the United States, passed on the 28th of February, 1795," and then proceeds to enumerate them; and then declares "that each and every non-commissioned officer and private, who shall have

neglected or refused to serve when called into actual service in pursuance of an order or requisition of the president of the United States, shall be liable to the penalties defined in the same act," and then proceeds to enumerate them. And to each clause is added, "or shall be liable to any penalty which may have been prescribed since the date of the passage of the said act, or which may hereafter be prescribed by any law of the United States." It then further provides that, "within one month after the expiration of the time for which any detachment of militia shall have been called into the service of the United States, by or in pursuance of orders from the president of the United States, the proper brigade inspector shall summon a general or a regimental court martial, as the case may be, for the trial of such person or persons belonging to the detachment called out, who shall have refused or neglected to march therewith, or to furnish a sufficient substitute, or who, after having marched therewith, shall have returned without leave from his commanding officer, of which delinquents the proper brigade inspector shall furnish to the said court martial an accurate list. And as soon as the said court martial shall have decided in each of the cases which shall be submitted to their consideration, the president thereof shall furnish to the marshal of the United States, or to his deputy, and also to the comptroller of the treasury of the United States, a list of the delinquents fined, in order that the further proceedings directed to be had thereon by the laws of the United States may be completed."

It is apparent from this summary, that each of the acts in question has in view the same objects, the punishment of any persons belonging to the militia of the state, who shall be called forth into the service of the United States by the president, and refuse to perform their duty. Both inflict the same penalties for the same acts of disobedience. In the act of 1795 it is the failure "to obey the orders of the president in any of the cases before recited;" and those orders are such as he is authorized to give by the first and second sections of the act, namely, to "call forth" the militia to execute the laws, to suppress insur-

rections, and repel invasions. In the act of Pennsylvania it is the neglect or refusal "to serve when called into actual service in pursuance of any orders of the president," which orders can only be under the act of 1795. And, to demonstrate this construction more fully, the delinquent is made liable to the penalties defined in the same act; and this again is followed by a clause varying the penalties so as to conform to those which from time to time may be inflicted by the laws of the United States for the same offence. So that there can be no reasonable doubt that the legislature of Pennsylvania meant to punish by its own courts martial an offence against the United States created by their laws, by a substantial re-enactment of those laws in its own militia code.

No doubt has been here breathed of the constitutionality of the provisions of the act of 1795, and they are believed to be, in all respects, within the legitimate authority of congress. In the construction, however, of this act the parties are at variance. The plaintiff contends, that, from the time of the calling forth of the militia by the president, it is to be considered as, *ipso facto*, "employed in the service of the United States," within the meaning of the constitution and the act of 1795; and, therefore, to be exclusively governed by congress. On the other hand, the defendant contends that there is no distinction between the "calling forth," and the "employment in service," of the militia, in the act of 1795, both meaning actual mustering in service, or an effectual calling into service; that the states retain complete authority over the militia, notwithstanding the call of the president, until it is obeyed by going into service; that the exclusive authority of the United States does not commence until the drafted troops are mustered, and in the actual pay and service of the union; and further, that the act of 1795 was never intended, by its language, to apply its penalties, except to militia in the latter predicament, leaving disobedience to the president's call to be punished by the states as an offence against state authority.

Upon the most mature reflection, it is my opinion, that there

is a sound distinction between the "calling forth" of the militia, and their being in the "actual service" or "employment" of the United States, contemplated both in the constitution and acts of congress. The constitution, in the clause already adverted to, enables congress to provide for the government of such part of the militia "as may be employed in the service of the United States," and makes the president commander-in-chief of the militia, "when called into the actual service of the United States." If the former clause included the authority in congress to call forth the militia, as being, in virtue of the call of the president, in actual service, there would certainly be no necessity for a distinct clause, authorizing it to provide for the calling forth of the militia; and the president would be commander-in-chief, not merely of the militia in actual service, but of the militia ordered into service. The acts of congress, also, aid the construction already asserted. The fourth section of the act of 1795 makes the militia "employed in the service of the United States" subject to the rules and articles of war; and these articles include capital punishments by courts martial. Yet one of the amendments (article fifth) to the constitution prohibits such punishments, "unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces," or in "the militia when in actual service, in time of war, or public danger." To prevent, therefore, a manifest breach of the constitution, we cannot but suppose that congress meant, (what, indeed, its language clearly imports,) in the fourth section, to provide only for cases of actual employment. The act of the 2d of January, 1795, (chapter 74,) provides for the pay of the militia "when called into actual service," commencing it on the day of their appearance at the place of rendezvous, and allowing a certain pay for every fifteen miles' travel from their homes to that place. The 97th article of the rules and articles of war (act of 10th of April, 1806, chapter 20) declares, that the officers and soldiers of any troops, whether militia or others, being mustered, and in the pay of the United States, shall, at all times and in all places, "when joined or

acting in conjunction with the regular forces" of the United States, be governed by these articles, and shall be subject to be tried by courts martial, in like manner with the officers and soldiers in the regular forces, save only that such courts martial shall be composed entirely of militia officers. And the act of the 18th of April, 1814, (chapter 141,) supplementary to that of 1795, provides for like courts martial for the trial of militia, drafted, detached, and called forth for the service of the United States, "whether acting in conjunction with the regular forces or otherwise." All these provisions for the government, payment, and trial of the militia, manifestly contemplate that the militia are in actual employment and service, and not merely that they have been "called forth," or ordered forth, and had failed to obey the orders of the president. It would seem almost absurd, to say that these men, who have performed no actual service, are yet to receive pay; that they are "employed," when they refuse to be employed in the public service; that they are "acting" in conjunction with the regular forces or otherwise, when they are not embodied to act at all; or that they are subject to the rules and articles of war as troops organized and employed in the public service, when they have utterly disclaimed all military organization and obedience. In my judgment, there are the strongest reasons to believe, that, by employment in the "service," or, as it is sometimes expressed, "in the actual service," of the United States, something more must be meant than a mere calling forth of the militia. That it includes some acts of organization, mustering, or marching, done or recognized in obedience to the call, in the public service. The act of 1795 is not in its terms compulsive upon any militia to serve; but contemplates an option, in the person drafted, to serve or not to serve; and if he pay the penalty inflicted by the law, he does not seem bound to perform any military duties.

Besides, the terms, "called forth," and "employed in service," cannot, in any appropriate sense, be said to be synonymous. To suppose them used to signify the same thing, in the constitution and acts of congress, would be to defeat the obvious

5 Wh. 63.

purposes of both. The constitution, in providing for the calling forth of the militia, necessarily supposes some act to be done before the actual employment of the militia; a requisition to perform service, a call to engage in a public duty. From the very nature of things, the call must precede the service; and to confound them is to break down the established meaning of language, and to render nugatory a power without which the militia can never be compelled to serve in defence of the union. For of what constitutional validity can the act of 1795 be, if the sense be not what I have stated? If congress cannot provide for a preliminary call, authorizing and requiring the service, how can it punish disobedience to that call? The argument that endeavors to establish such a proposition is utterly without any solid foundation. We do not sit here to fritter away the constitution upon metaphysical subtilties.

Nor is it true, that the act of 1705 confines its penalties to such of the militia as are in actual service, leaving those who refuse to comply with the orders of the president to the punishment that the state may choose to inflict for disobedience. On the contrary, if there be any certainty in language, the fifth section applies exclusively to those of the militia who are "called forth" by the president, and fail to obey his orders, or, in other words, who refuse to go into the actual service of the United States. It inflicts no penalty in any other case; and it supposes, and justly, that all the cases of disobedience to the militia, while in actual service, were sufficiently provided for by the fourth section of the act, they being thereby subjected to the rules and articles of war. It inflicts the penalty, too, as we have already seen, in the identical cases, and none other, to which the paragraphs of the militia act of Pennsylvania now in question pointedly address themselves; and in the identical case for which the present plaintiff was tried, convicted, and punished, by the state court martial. So that, if the defendant's construction of the act of 1795 could prevail, it would not help his case. All the difficulties as to the repugnancy between the act of congress and of Pennsylvania, would still remain, with the

additional difficulty, that the court would be driven to say that the mere act of calling forth put the militia, *ipso facto*, into actual service, and so placed them exclusively under the government of congress.

In the remarks which have already been made the answer to another proposition stated by the defendant is necessarily included. The offence to which the penalties are annexed, in the fourth section of the act of 1795, is not an offence against state authority, but against the United States, created by a law of congress, in virtue of a constitutional authority, and punishable by a tribunal which it has selected, and which it can change at its pleasure.

That tribunal is a court martial; and the defendant contends, that, as no explanatory terms are added, a state court martial is necessarily intended, because the laws of the union have not effectually created any court martial which, sitting under the authority of the United States, can in all cases try the offence. It will at once be seen, that the act of 1795 has not expressly delegated cognizance of the offence to a state court martial, and the question naturally arises, In what manner, then, can it be claimed? When a military offence is created by an act of congress, to be punished by a court martial, how is such an act to be interpreted? If a similar clause were in a state law, we should be at no loss to give an immediate and definite construction to it, namely, that it pointed to a state court martial; and why? Because the offence being created by state legislation, to be executed for state purposes must be supposed to contemplate in its execution such tribunals as the state may erect, and control, and confer jurisdiction upon. A state legislature cannot be presumed to legislate as to foreign tribunals; but must be supposed to speak in reference to those which may be reached by its own sovereignty. Precisely the same reasons must apply to the construction of a law of the United States. The object of the law being to provide for the exercise of a power vested in congress by the constitution, whatever is directed to be done must be supposed to be done, unless the contrary

5 Wh. 65.

be expressed, under the authority of the union. When, then, a court martial is spoken of in general terms in the act of 1795, the reasonable interpretation is, that it is a court martial to be organized under the authority of the United States,—a court martial whom congress may convene and regulate. There is no pretence to say that congress can compel a state court martial to convene and sit in judgment on such offence. Such an authority is nowhere confided to it by the constitution. Its power is limited to the few cases already specified, and these, most assuredly, do not embrace it; for it is not an implied power necessary or proper to carry into effect the given powers. The nation may organize its own tribunals for this purpose; and it has no necessity to resort to other tribunals to enforce its rights. If it do not choose to organize such tribunals, it is its own fault; but it is not, therefore, imperative upon a state tribunal to volunteer in its service. The sixth section of the same act comes in aid of this most reasonable construction. It declares that courts martial for the trial of militia shall be composed of militia officers only, which plainly shows that it supposed that regular troops and officers were in the same service; and yet it is as plain, that this provision would be superfluous, if state courts martial were solely intended, since the states do not keep, and ordinarily have no authority to keep, regular troops, but are bound to confine themselves to militia. It might with as much propriety be contended, that the courts martial for the trial of militia, under the ninety-seventh article of the rules and articles of war, are to be state courts martial. The language of that article, so far as respects this point, is almost the same with the clause now under consideration.

As to the argument itself, upon which the defendant erects his construction of this part of the act, its solidity is not admitted. It does not follow, because congress have neglected to provide adequate means to enforce their laws, that a resulting trust is reposed in the state tribunals to enforce them. If an offence be created of which no court of the United States has a vested cognizance, the state court may not, therefore, assume

jurisdiction, and punish it. It cannot be pretended, that the states have retained any power to enforce fines and penalties created by the laws of the United States, in virtue of their general sovereignty, for that sovereignty did not originally attach on such subjects. They sprung from the union, and had no previous existence. It would be a strange anomaly in our national jurisprudence, to hold the doctrine, that, because a new power created by the constitution of the United States was not exercised to its full extent, therefore the states might exercise it by a sort of process in aid. For instance, because congress decline "to borrow money on the credit of the United States," or "constitute tribunals inferior to the supreme court," or "to make rules for the government and regulation of the land and naval forces," or exercise either of them defectively, that a state might step in, and by its legislation supply those defects, or assume a general jurisdiction on these subjects. If, therefore, it be conceded, that congress have not as yet legislated to the extent of organizing courts martial for the trial of offences created by the act of 1795, it is not conceded, that, therefore, state courts martial may, in virtue of state laws, exercise the authority, and punish offenders. Congress may hereafter supply such defects, and cure all inconveniences.

It is a general principle, too, in the policy, if not the customary law, of nations, that no nation is bound to enforce the penal laws of another within its own dominions. The authority naturally belongs, and is confided, to the tribunals of the nation creating the offences. In a government formed like ours, where there is a division of sovereignty, and, of course, where there is a danger of collision, from the near approach of powers to a conflict with each other, it would seem a peculiarly safe and salutary rule, that each government should be left to enforce its own penal laws in its own tribunals. It has been expressly held by this court, that no part of the criminal jurisdiction of the United States can consistently with the constitution be delegated by congress to state tribunals;* and there is not the slightest inclin-

* *Martin* v. *Hunter*, 1 Wheaton's Reports, 304, 337, S. P. *United States* v. *Lathrop*, 17 Johnson's Reports, 4.

ation to retract that opinion. The judicial power of the union clearly extends to all such cases. No concurrent power is retained by the states, because the subject-matter derives its existence from the constitution; and the authority of congress to delegate it cannot be implied, for it is not necessary or proper in any constitutional sense. But even if congress could delegate it, it would still remain to be shown that it had so done. We have seen that this cannot be correctly deduced from the act of 1795; and we are, therefore, driven to decide, whether a state can, without such delegation, constitutionally assume and exercise it.

It is not, however, admitted, that the laws of the United States have not enabled courts martial to be held under their own authority for the trial of these offences, at least when there are militia officers acting in service in conjunction with regular troops. The ninety-seventh article of war gives an authority for the trial of militia in many cases; and the act of the 18th of April, 1814, (chapter 141, which has now expired,) provided, as we have already seen, for cases where the militia was acting alone. To what extent these laws applied is not now necessary to be determined. The subject is introduced solely to prevent any conclusion that they are deemed to be wholly inapplicable. Upon the whole, I am of opinion, that the courts martial intended by the act of 1795 are not state courts martial, but those of the United States; and this is the same construction which has been already put upon the same act by the supreme court of Pennsylvania.*

What, then, is the state of the case before the court? Congress, by a law, declare that the officers and privates of the militia, who shall, when called forth by the president, fail to obey his orders, shall be liable to certain penalties, to be adjudged by a court martial convened under its own authority. The legislature of Pennsylvania inflict the same penalties for the same disobedience, and direct these penalties to be adjudged by a state court martial called exclusively under its own author-

* *Ex parte* Bolson, 5 Hall's American Law Journal, 476.

ity. The offence is created by a law of the United States, and is solely against their authority, and made punishable in a specific manner; the legislature of Pennsylvania, without the assent of the United States, insist upon being an auxiliary, nay, as the defendant contends, a principal, if not a paramount sovereign, in its execution. This is the real state of the case; and it is said without the slightest disrespect for the legislature of Pennsylvania, who, in passing this act, were, without question, governed by the highest motives of patriotism, public honor, and fidelity to the union. If it has transcended its legitimate authority, it has committed an unintentional error, which it will be the first to repair, and the last to vin licate. Our duty compels us, however, to compare the legislation, and not the intention, with the standard of the constitution.

It has not been denied, that congress may constitutionally delegate to its own courts exclusive jurisdiction over cases arising under its own laws. It is, too, a general principle in the construction of statutes, that, where a penalty is prescribed to be recovered in a special manner, in a special court, it excludes a recovery in any other mode or court. The language is deemed expressive of the sense of the legislature, that the jurisdiction shall be exclusive. In such a case, it is a violation of the statute, for any other tribunal to assume jurisdiction. If, then, we strip the case before the court of all unnecessary appendages, it presents this point, that congress had declared that its own courts martial shall have exclusive jurisdiction of the offence; and the state of Pennsylvania claims a right to interfere with that exclusive jurisdiction, and to decide in its own courts upon the merits of every case of alleged delinquency. Can a more direct collision with the authority of the United States be imagined? It is an exercise of concurrent authority where the laws of congress have constitutionally denied it. If an act of congress be the supreme law of the land, it cannot be made more binding by an affirmative re-enactment of the same act by a state legislature. The latter must be merely inoperative and void; for it seeks to give sanction to the [illegible] already possesses the highest sanction.

5 Wh. 71.

What are the consequences, if the state legislation in the present case be constitutional? In the first place, if the trial in the state court martial be on the merits, and end in a condemnation or acquittal, one of two things must follow, either that the United States courts martial are thereby devested of their authority to try the same case, in violation of the jurisdiction confided to them by congress; or that the delinquents are liable to be twice tried and punished for the same offence, against the manifest intent of the act of congress, the principles of the common law, and the genius of our free government. In the next place, it is not perceived how the right of the president to pardon the offence can be effectually exerted; for if the state legislature can, as the defendant contends, by its own enactment, make it a state offence, the pardoning power of the state can alone purge away such an offence. The president has no authority to interfere in such a case. In the next place, if the state can re-enact the same penalties, it may enact penalties substantially different for the same offence, to be adjudged in its own courts. If it possesses a concurrent power of legislation, so as to make it a distinct state offence, what punishments it shall impose must depend upon its own discretion. In the exercise of that discretion it is not liable to the control of the United States. It may enact more severe or more mild punishments than those declared by congress. And thus an offence originally created by the laws of the United States, and growing out of their authority, may be visited with penalties utterly incompatible with the intent of the national legislature. It may be said, that state legislation cannot be thus exercised, because its concurrent power must be in subordination to that of the United States. If this be true, (and it is believed to be so,) then it must be upon the ground, that the offence cannot be made a distinct state offence, but is exclusively created by the laws of the United States, and is to be tried and punished as congress has directed, and not in any other manner or to any other extent. Yet the argument of the defendant's counsel might be here urged, that the state law was merely auxiliary to

that of the United States; and that it sought only to enforce a public duty more effectually by other penalties, in aid of those prescribed by congress. The repugnancy of such a state law to the national authority would, nevertheless, be manifest, since it would seek to punish an offence created by congress, differently from the declared will of congress. And the repugnancy is not, in my judgment, less manifest where the state law undertakes to punish an offence by a state court martial, which the law of the United States confines to the jurisdiction of a national court martial.

The present case has been illustrated, in the argument of the defendant's counsel, by reference to cases in which state courts under state laws exercise a concurrent jurisdiction over offences created and punished by the laws of the United States. The only case of this description which has been cited at the bar is the forgery of notes of the Bank of the United States, which by an act of congress was punished by fine and imprisonment, and which under state laws has also been punished in some state courts, and particularly in Pennsylvania.* In respect to this case, it is to be recollected, that there is an express proviso in the act of congress, that nothing in that act should be construed to deprive the state courts of their jurisdiction, under the state laws, over the offences declared punishable by that act. There is no such proviso in the act of 1795, and, therefore, there is no complete analogy to support the illustration.

That there are cases in which an offence particularly aimed against the laws or authority of the United States may, at the same time, be directed against state authority also, and thus be within the legitimate reach of state legislation, in the absence of national legislation on the same subject, I pretend not to affirm, or to deny. It will be sufficient to meet such a case when it shall arise. But that an offence against the constitutional authority

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* See *White* v. *Commonwealth*, 4 Binney's Reports, 418. *Livingston* v. *Van Ingen*, 9 Johnstone's Reports, 507, 567.

of the United States can, after the national legislature has provided for its trial and punishment, be cognizable in a state court, in virtue of a state law creating a like offence, and defining its punishment, without the consent of congress, I am very far from being ready to admit. It seems to me, that such an exercise of state authority is completely open to the great objections which are presented in the case before us. Take the case of a capital offence, as, for instance, treason against the United States; can a state legislature vest its own courts with jurisdiction over such an offence, and punish it either capitally or otherwise? Can the national courts be ousted of their jurisdiction by a trial of the offender in a state court? Would an acquittal in a state court be a good bar upon an indictment for the offence in the national courts? Can the offender, against the letter of the constitution of the United States, "be subject, for the same offence, to be twice put in jeopardy of life or limb?" These are questions which, it seems to me, are exceedingly difficult to answer in the affirmative. The case, then, put by the defendant's counsel, clears away none of the embarrassments which surround their construction of the case at the bar of the court.

Upon the whole, with whatever reluctance, I feel myself bound to declare that the clauses of the militia act of Pennsylvania now in question are repugnant to the constitutional laws of congress on the same subject, and are utterly void; and that, therefore, the judgment of the state court ought to be reversed. In this opinion I have the concurrence of one of my brethren.

Judgment affirmed.

5 Wh. 75.

THE UNITED STATES v. SMITH.

FEBRUARY TERM, 1820.

[5 Wheaton's Reports, 153–183.]

Thomas Smith and others, part of the crew of a Buenos Ayrean privateer, mutinied, and left their own vessel while lying in the port of Margarita, seized another privateer in the harbor; chose officers from among themselves; put to sea, without documents or commission; and took and robbed a Spanish vessel on the high seas. Smith was indicted in the circuit court for the district of Virginia; and the judges being opposed in opinion respecting his crime having been piracy, under the constitution of the United States, the question was certified to the supreme court; the opinion of which was delivered by Judge Story:—

The act of congress upon which this indictment is founded provides, "that, if any person or persons whatsoever, shall upon the high seas commit the crime of piracy, as defined by the law of nations, and such offender or offenders shall be brought into, or found in, the United States, every such offender or offenders shall, upon conviction thereof, &c., be punished with death."

The first point made at the bar is, whether this enactment be a constitutional exercise of the authority delegated to congress upon the subject of piracies. The constitution declares that congress shall have power to "define and punish piracies and felonies committed on the high seas, and offences against the law of nations." The argument which has been urged in behalf of the prisoner is, that congress is bound to define, in terms, the offence of piracy, and is not at liberty to leave it to be ascertained by judicial interpretation. If the argument be well founded, it seems admitted by the counsel that it equally applies to the eighth section of the act of congress of 1790, (chapter 9,) which declares that robbery and murder committed on the high seas shall be deemed piracy; and yet, notwithstanding a series

5 Wh. 158.

of contested adjudications on this section, no doubt has hitherto been breathed of its conformity to the constitution.

In our judgment the construction contended for proceeds upon too narrow a view of the language of the constitution. The power given to congress is not merely "to define and punish piracies;" if it were, the words "to define" would seem almost superfluous, since the power to punish piracies would be held to include the power of ascertaining and fixing the definition of the crime. And it has been very justly observed, in a celebrated commentary, that the definition of piracies might have been left without inconvenience to the law of nations, though a legislative definition of them is to be found in most municipal codes.* But the power is also given "to define and punish felonies on the high seas, and offences against the law of nations." The term "felonies" has been supposed, in the same work, not to have a very exact and determinate meaning in relation to offences at the common law committed within the body of a county. However this may be, in relation to offences on the high seas, it is necessarily somewhat indeterminate, since the term is not used in the criminal jurisprudence of the admiralty in the technical sense of the common law.† Offences, too, against the law of nations, cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognized by the common consent of nations. In respect, therefore, as well to felonies on the high seas as to offences against the law of nations, there is a peculiar fitness in giving the power to define as well as to punish; and there is not the slightest reason to doubt that this consideration had very great weight in producing the phraseology in question.

But supposing congress were bound, in all the cases included in the clause under consideration, to define the offence, still there is nothing which restricts it to a mere logical enumeration in detail of all the facts constituting the offence. Congress may

* *The Federalist*, No. 42, page 276.

† See 3 Inst. 112; Hawk. P. C. chap. 37; Moore, 576.

as well define by using a term of a known and determinate meaning as by an express enumeration of all the particulars included in that term. That is certain which is by necessary reference made certain. When the act of 1790 declares that any person who shall commit the crime of robbery, or murder, on the high seas, shall be deemed a pirate, the crime is not less clearly ascertained than it would be by using the definitions of these terms as they are found in our treatises of the common law. In fact, by such a reference, the definitions are necessarily included, as much as if they stood in the text of the act. In respect to murder, where "malice aforethought" is of the essence of the offence, even if the common law definition were quoted in express terms, we should still be driven to deny that the definition was perfect, since the meaning of "malice aforethought" would remain to be gathered from the common law. There would then be no end to our difficulties, or our definitions, for each would involve some terms which might still require some new explanation. Such a construction of the constitution is, therefore, wholly inadmissible. To define piracies, in the sense of the constitution, is merely to enumerate the crimes which shall constitute piracy; and this may be done either by a reference to crimes having a technical name and determinate extent, or by enumerating the acts in detail upon which the punishment is inflicted.

It is next to be considered, whether the crime of piracy is defined by the law of nations with reasonable certainty. What the law of nations on this subject is may be ascertained by consulting the works of jurists writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law. There is scarcely a writer on the law of nations, who does not allude to piracy as a crime of a settled and determinate nature; and whatever may be the diversity of definitions in other respects, all writers concur in holding that robbery, or forcible depredations, upon the sea, *animo furandi*, is piracy. The same doctrine is held by all the great writers on maritime law, in terms that admit of no

5 Wh. 160.

reasonable doubt. The common law, too, recognizes and punishes piracy as an offence not against its own municipal code, but as an offence against the law of nations, (which is part of the common law,) as an offence against the universal law of society, a pirate being deemed an enemy of the human race. Indeed, until the statute of twenty-eighth of Henry VIII., chapter 15, piracy was punishable in England only in the admiralty as a civil law offence; and that statute, in changing the jurisdiction, has been universally admitted not to have changed the nature of the offence.* Sir Charles Hedges, in his charge at the admiralty sessions, in the case of *Rex* v. *Dawson*, (5 State Trials,) declared, in emphatic terms, that "piracy is only a sea term for robbery, piracy being a robbery committed within the jurisdiction of the admiralty." Sir Leoline Jenkins, too, on a like occasion, declared that "a robbery, when committed upon the sea, is what we call piracy;" and he cited the civil law writers, in proof. And it is manifest from the language of Sir William Blackstone,† in his comments on piracy, that he considered the common law definition as distinguishable in no essential respect from that of the law of nations. So that, whether we advert to writers on the common law, or the maritime law, or the law of nations, we shall find that they universally treat of piracy as an offence against the law of nations, and that its true definition by that law is robbery upon the sea. And the general practice of all nations, in punishing all persons, whether natives or foreigners, who have committed this offence against any persons whatsoever with whom they are in amity, is a conclusive proof that the offence is supposed to depend, not upon the particular provisions of any municipal code, but upon the law of nations, both for its definition and punishment. We have, therefore, no hesitation in declaring that piracy, by the law of nations, is robbery upon the sea, and that it is sufficiently and constitutionally defined by the fifth section of the act of 1819.

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* Hawk. P. C. chap. 37, sec. 2; 3 Inst. 112.

† 4 Bl. Com. 73.

Another point has been made in this case, which is, that the special verdict does not contain sufficient facts upon which the court can pronounce that the prisoner is guilty of piracy. We are of a different opinion. The special verdict finds that the prisoner is guilty of the plunder and robbery charged in the indictment; and finds certain additional facts, from which it is most manifest that he and his associates were, at the time of committing the offence, freebooters upon the sea, not under the acknowledged authority, or deriving protection from the flag or commission, of any government. If, under such circumstances, the offence be not piracy, it is difficult to conceive any which would more completely fit the definition.

It is to be certified to the circuit court, that, upon the facts stated, the case is piracy, as defined by the law of nations, so as to be punishable under the act of congress of the 3d of March, 1819.

5 Wh. 163.

ANDERSON *v.* DUNN.

FEBRUARY TERM, 1821.

[6 Wheaton's Reports, 204-235.]

Dunn, being sergeant-at-arms to the United States house of representatives, in accordance with a resolution of the house, arrested Anderson, not a member thereof, for contempt; for which Anderson sued him in trespass in the circuit court for the district of Columbia, where judgment being given for Dunn, the plaintiff sued out his writ of error to the supreme court; the opinion of which was delivered by Judge Johnson :—

Notwithstanding the range which has been taken by the plaintiff's counsel, in the discussion of this cause, the merits of it really lie in a very limited compass. The pleadings have narrowed them down to the simple inquiry, whether the house of representatives can take cognizance of contempts committed against themselves under any circumstances? The duress complained of was sustained under a warrant issued to compel the party's appearance, not for the actual infliction of punishment for an offence committed. Yet it cannot be denied, that the power to institute a prosecution must be dependent upon the power to punish. If the house of representatives possessed no authority to punish for contempt, the initiating process issued in the assertion of that authority must have been illegal; there was a want of jurisdiction to justify it.

It is certainly true, that there is no power given by the constitution to either house to punish for contempts, except when committed by their own members. Nor does the judicial or criminal power given to the United States, in any part, expressly extend to the infliction of punishment for contempt of either house, or any one co-ordinate branch of the government. Shall we, therefore, decide that no such power exists?

It is true, that such a power, if it exists, must be derived from

implication, and the genius and spirit of our institutions are hostile to the exercise of implied powers. Had the faculties of man been competent to the framing of a system of government which would have left nothing to implication, it cannot be doubted, that the effort would have been made by the framers of the constitution. But what is the fact? There is not in the whole of that admirable instrument a grant of powers which does not draw after it others, not expressed, but vital to their exercise; not substantive and independent, indeed, but auxiliary and subordinate.

The idea is utopian, that government can exist without leaving the exercise of discretion somewhere. Public security against the abuse of such discretion must rest on responsibility, and stated appeals to public approbation. Where all power is derived from the people, and public functionaries, at short intervals, deposite it at the feet of the people, to be resumed again only at their will, individual fears may be alarmed by the monsters of imagination, but individual liberty can be in little danger.

No one is so visionary as to dispute the assertion, that the sole end and aim of all our institutions is the safety and happiness of the citizen. But the relation between the action and the end is not always so direct and palpable as to strike the eye of every observer. The science of government is the most abstruse of all sciences; if, indeed, that can be called a science which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment.

But if there is one maxim which necessarily rides over all others, in the practical application of government, it is, that the public functionaries must be left at liberty to exercise the powers which the people have intrusted to them. The interests and dignity of those who created them require the exertion of the powers indispensable to the attainment of the ends of their creation. Nor is a casual conflict with the rights of particular individuals any reason to be urged against the exercise of such

6 Wh. 226.

powers. The wretch beneath the gallows may repine at the fate which awaits him, and yet it is no less certain, that the laws under which he suffers were made for his security. The unreasonable murmurs of individuals against the restraints of society have a direct tendency to produce that worst of all lespotisms, which makes every individual the tyrant over his neighbor's rights.

That "the safety of the people is the supreme law" not only comports with, but is indispensable to, the exercise of those powers in their public functionaries without which that safety cannot be guarded. On this principle it is, that courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution.

It is true, that the courts of justice of the United States are vested, by express statute provision, with power to fine and imprison for contempts; but it does not follow, from this circumstance, that they would not have exercised that power without the aid of the statute, or not in cases, if such should occur, to which such statute provision may not extend; on the contrary, it is a legislative assertion of this right, as incidental to a grant of judicial power, and can only be considered either as an instance of abundant caution, or a legislative declaration that the power of punishing for contempt shall not extend beyond its known and acknowledged limits of fine and imprisonment.

But it is contended, that, if this power in the house of representatives is to be asserted on the plea of necessity, the ground is too broad, and the result too indefinite; that the executive, and every co-ordinate, and even subordinate, branch of the government may resort to the same justification, and the whole assume to themselves, in the exercise of this power, the most tyrannical licentiousness.

This is unquestionably an evil to be guarded against, and if the doctrine may be pushed to that extent, it must be a bad doctrine, and is justly denounced.

6 Wh. 227.

But what is the alternative? The argument obviously leads to the total annihilation of the power of the house of representatives to guard itself from contempts, and leaves it exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may meditate against it. This result is fraught with too much absurdity not to bring into doubt the soundness of any argument from which it is derived. That a deliberative assembly, clothed with the majesty of the people, and charged with the care of all that is dear to them; composed of the most distinguished citizens selected and drawn together from every quarter of a great nation; whose deliberations are required by public opinion to be conducted under the eye of the public, and whose decisions must be clothed with all that sanctity which unlimited confidence in their wisdom and purity can inspire; that such an assembly should not possess the power to suppress rudeness, or repel insult, is a supposition too wild to be suggested. And, accordingly, to avoid the pressure of these considerations, it has been argued, that the right of the respective houses to exclude from their presence, and their absolute control within their own walls, carry with them the right to punish contempts committed in their presence; while the absolute legislative power given to congress within this district enables them to provide by law against all other insults against which there is any necessity for providing.

It is to be observed, that, so far as the issue of this cause is implicated, this argument yields all right of the plaintiff in error to a decision in his favor; for, *non constat*, from the pleadings, but that this warrant issued for an offence committed in the immediate presence of the house.

Nor is it immaterial to notice what difficulties the negation of this right in the house of representatives draws after it, when it is considered, that the concession of the power, if exercised within their walls, relinquishes the great grounds of the argument, to wit: the want of an express grant, and the unrestricted and undefined nature of the power here set up. For why should the house be at liberty to exercise an ungranted, an unlimited,

6 Wh. 229.

and undefined power within their walls, any more than without them? If the analogy with individual right and power be resorted to, it will reach no farther than to exclusion, and it requires no exuberance of imagination to exhibit the ridiculous consequences which might result from such a restriction imposed upon the conduct of a deliberative assembly.

Nor would their situation be materially relieved by resorting to their legislative power within the district. That power may, indeed, be applied to many purposes, and was intended by the constitution to extend to many purposes, indispensable to the security and dignity of the general government; but they are purposes of a more grave and general character than the offences which may be denominated contempts, and which, from their very nature, admit of no precise definition. Judicial gravity will not admit of the illustrations which this remark would admit of. Its correctness is easily tested by pursuing, in imagination, a legislative attempt at defining the cases to which the epithet "contempt" might be reasonably applied.

But although the offence be held undefinable, it is justly contended, that the punishment need not be indefinite. Nor is it so.

We are not now considering the extent to which the punishing power of congress, by a legislative act, may be carried. On that subject the bounds of their power are to be found in the provisions of the constitution.

The present question is, What is the extent of the punishing power which the deliberative assemblies of the union may assume and exercise on the principle of self-preservation?

Analogy, and the nature of the case, furnish the answer,—"the least possible power adequate to the end proposed;" which is the power of imprisonment. It may, at first view, and from the history of the practice of our legislative bodies, be thought to extend to other inflictions. But every other will be found to be mere commutation for confinement; since commitment alone is the alternative where the individual proves contumacious. And even to the duration of imprisonment a period is imposed by the nature of things, since the existence of the

6 Wh. 230.

power that imprisons is indispensable to its continuance; and although the legislative power continues perpetual, the legislative body ceases to exist on the moment of its adjournment or periodical dissolution. It follows, that imprisonment must terminate with that adjournment.

This view of the subject necessarily sets bounds to the exercise of a caprice which has sometimes disgraced deliberative assemblies, when under the influence of strong passions or wicked leaders, but the instances of which have long since remained on record only as historical facts, not as precedents for imitation. In the present fixed and settled state of English institutions, there is no more danger of their being revived, probably, than in our own.

But the American legislative bodies have never possessed, or pretended to, the omnipotence which constitutes the leading feature in the legislative assembly of Great Britain, and which may have led occasionally to the exercise of caprice, under the specious appearance of merited resentment.

If it be inquired, What security is there, that, with an officer avowing himself devoted to their will, the house of representatives will confine its punishing power to the limits of imprisonment, and not push it to the infliction of corporal punishment, or even death, and exercise it in cases affecting the liberty of speech and of the press? the reply is to be found in the consideration, that the constitution was formed in and for an advanced state of society, and rests at every point on received opinions and fixed ideas. It is not a new creation, but a combination of existing materials, whose properties and attributes were familiarly understood, and had been determined by reiterated experiments. It is not, therefore, reasoning upon things as they are, to suppose that any deliberative assembly, constituted under it, would ever assert any other rights and powers than those which had been established by long practice, and conceded by public opinion. Melancholy, also, would be that state of distrust which rests not a hope upon a moral influence. The most absolute tyranny could not subsist where men could not be

6 Wh. 231.

trusted with power because they might abuse it, much less a government which has no other basis than the sound morals, moderation, and good sense of those who compose it. Unreasonable jealousies not only blight the pleasures, but dissolve the very texture of society.

But it is argued, that the inference, if any, arising under the constitution, is against the exercise of the powers here asserted by the house of representatives; that the express grant of power to punish their members respectively, and to expel them, by the application of a familiar maxim raises an implication against the power to punish any other than their own members.

This argument proves too much; for its direct application would lead to the annihilation of almost every power of congress. To enforce its laws upon any subject, without the sanction of punishment, is obviously impossible. Yet there is an express grant of power to punish in one class of cases and one only, and all the punishing power exercised by congress in any cases, except those which relate to piracy and offences against the laws of nations, is derived from implication. Nor did the idea ever occur to any one, that the express grant in one class of cases repelled the assumption of the punishing power in any other.

The truth is that the exercise of the powers given over their own members was of such a delicate nature that a constitutional provision became necessary to assert or communicate it. Constituted, as that body is, of the delegates of confederated states, some such provision was necessary to guard against their mutual jealousy, since every proceeding against a representative would indirectly affect the honor or interests of the state which sent him.

In reply to the suggestion, that, on this same foundation of necessity might be raised a superstructure of implied powers in the executive and every other department and even ministerial officer of the government, it would be sufficient to observe that neither analogy nor precedent would support the assertion of such powers in any other than a legislative or judicial body.

6 Wh. 23.

Even corruption anywhere else would not contaminate the source of political life. In the retirement of the cabinet, it is not expected that the executive can be approached by indignity or insult; nor can it ever be necessary to the executive, or any other department, to hold a public deliberative assembly. These are not arguments; they are visions which mar the enjoyment of actual blessings with the attack or feint of the harpies of imagination.

As to the minor points made in this case, it is only necessary to observe that there is nothing on the face of this record from which it can appear on what evidence this warrant was issued. And we are not to presume that the house of representatives would have issued it without duly establishing the fact charged on the individual. And as to the distance to which the process might reach, it is very clear that there exists no reason for confining its operations to the limits of the District of Columbia; after passing those limits, we know no bounds that can be prescribed to its range but those of the United States. And why should it be restricted to other boundaries? Such are the limits of the legislating powers of that body; and the inhabitant of Louisiana or Maine may, as probably, charge them with bribery and corruption or attempt by letter to induce the commission of either, as the inhabitant of any other section of the union. If the inconvenience be urged, the reply is obvious; there is no difficulty in observing that respectful deportment which will render all apprehension chimerical.

Judgment affirmed.

MARTIN *v.* MOTT.

JANUARY TERM, 1827.

[12 Wheaton's Reports, 19-39.]

During the war of 1812, the governor of New York, upon the requisition of the president of the United States, called out the militia of that state. Mott was a private militia-man, but did not go out. On the 24th of September, 1814, General Lewis summoned a court martial to try those who had neglected the call of the governor; Mott appeared before the court, defended himself, and was sentenced to pay a fine. When this sentence was passed, however, there was no officer of rank equal to that of the governor of New York when he made the call for the militia, or of General Lewis, within the New York district; but the sentence of the court was approved by the president of the United States, and Martin, the deputy marshal, thereupon collected the fine. Mott sued Martin for so doing; Martin set forth the facts,* to which Mott demurred. The supreme court and court of errors in New York decided in Mott's favor, and thereupon Martin took out his writ of error to the United States supreme court. In the following opinion of the court, as delivered by Judge Story, the objections made to Martin's defence are stated so fully as to make any detail of them needless :—

This is a writ of error to the judgment of the court for the trial of impeachments and the correction of errors of the state of New York, being the highest court of that state, and is brought here in virtue of the twenty-fifth section of the judiciary act of 1789 (chapter 20). The original action was a replevin for certain goods and chattels, to which the original defendant put in an avowry, and to that avowry there was a demurrer, assign-

* In an avowry, as it is called.

ing nineteen distinct and special causes of demurrer. Upon a joinder in demurrer, the supreme court of the state gave judgment against the avowant; and that judgment was affirmed by the high court to which the present writ of error is addressed.

The avowry, in substance, asserts a justification of the taking of the goods and chattels to satisfy a fine and forfeiture imposed upon the original plaintiff by a court martial, for a failure to enter the service of the United States as a militia-man, when thereto required by the president of the United States, in pursuance of the act of the 28th of February, 1795 (chapter 101). It is argued that this avowry is defective, both in substance and form; and it will be our business to discuss the most material of these objections; and as to others, of which no particular notice is taken, it is to be understood that the court are of opinion that they are either unfounded in fact or in law, and do not require any separate examination.

For the more clear and exact consideration of the subject, it may be necessary to refer to the constitution of the United States, and some of the provisions of the act of 1795. The constitution declares that congress shall have power "to provide for calling forth the militia, to execute the laws of the union, suppress insurrections, and repel invasions;" and also "to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States." In pursuance of this authority, the act of 1795 has provided, "that, whenever the United States shall be invaded, or be in imminent danger of invasion, from any foreign nation or Indian tribe, it shall be lawful for the president of the United States to call forth such number of the militia of the state or states most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasion, and to issue his order for that purpose to such officer or officers of the militia as he shall think proper." And like provisions are made for the other cases stated in the constitution. It has not been denied here, that the act of 1795 is within the constitutional authority of congress, or that congress may law-

fully provide for cases of imminent danger of invasion, as well as for cases where an invasion has actually taken place. In our opinion there is no ground for a doubt on this point, even if it had been relied on; for the power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object. One of the best means to repel invasion is to provide the requisite force for action before the invader himself has reached the soil.

The power thus confided by congress to the president is, doubtless, of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without a correspondent responsibility. It is, in its terms, a limited power, confined to cases of actual invasion, or of imminent danger of invasion. If it be a limited power, the question arises, By whom is the exigency to be judged of and decided? Is the president the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the president are addressed may decide for himself, and equally open to be contested by every militia-man who shall refuse to obey the orders of the president? We are all of opinion that the authority to decide whether the exigency has arisen belongs exclusively to the president, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the union. A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service, and the command of a military nature; and in such cases, every delay, and every obstacle to an efficient and immediate compliance, necessarily

tend to jeopard the public interests. While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the facts upon which the commander-in-chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance. If "the power of regulating the militia, and of commanding its services in times of insurrection and invasion, are (as it has been emphatically said they are) natural incidents to the duties of superintending the common defence, and of watching over the internal peace of the confederacy,"* these powers must be so construed, as to the modes of their exercise, as not to defeat the great end in view. If a superior officer has a right to contest the orders of the president upon his own doubts as to the exigency having arisen, it must be equally the right of every inferior officer and soldier; and any act done by any person in furtherance of such orders would subject him to responsibility in a civil suit, in which his defence must finally rest upon his ability to establish the facts by competent proofs. Such a course would be subversive of all discipline, and expose the best disposed officers to the chances of ruinous litigation. Besides, in many instances, the evidence upon which the president might decide that there is imminent danger of invasion might be of a nature not constituting strict technical proof, or the disclosure of the evidence might reveal important secrets of state, which the public interest, and even safety, might imperiously demand to be kept in concealment.

If we look at the language of the act of 1795, every conclusion drawn from the nature of the power itself is strongly fortified. The words are, "whenever the United States shall be invaded, or be in imminent danger of invasion, &c., it shall be lawful for the president, &c., to call forth such number of the militia, &c., as he may judge necessary to repel such invasion." The power itself is confided to the executive of the union, to him who is, by the constitution, "the commander-in-chief of

* *The Federalist*, No. 29.

the militia, when called into the actual service of the United States," whose duty it is to "take care that the laws be faithfully executed," and whose responsibility for an honest discharge of his official obligations is secured by the highest sanctions. He is necessarily constituted the judge of the existence of the exigency in the first instance, and is bound to act according to his belief of the facts. If he does so act, and decides to call forth the militia, his orders for this purpose are in strict conformity with the provision of the law; and it would seem to follow, as a necessary consequence, that every act done by a subordinate officer, in obedience to such orders, is equally justifiable. The law contemplates, that, under such circumstances, orders shall be given to carry the power into effect; and it cannot, therefore, be a correct inference, that any other person has a just right to disobey them. The law does not provide for any appeal from the judgment of the president, or for any right in subordinate officers to review his decision, and in effect defeat it. Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts. And, in the present case, we are all of opinion that such is the true construction of the act of 1795. It is no answer, that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the constitution itself. In a free government the danger must be remote; since, in addition to the high qualities, which the executive must be presumed to possess, of public virtue, and honest devotion to the public interests, the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny.

This doctrine has not been seriously contested upon the present occasion. It was, indeed, maintained and approved by the supreme court of New York, in the case of *Vanderheyden* v.

12 Wh. 31.

Young, (11 Johnson's Reports, 150,) where the reasons in support of it were most ably expounded by Mr. Justice Spencer, in delivering the opinion of the court.

But it is now contended, as it was contended in that case, that, notwithstanding the judgment of the president is conclusive as to the existence of the exigency, and may be given in evidence as conclusive proof thereof, yet that the avowry is fatally defective, because it omits to aver that the fact did exist. The argument is, that the power confided to the president is a limited power, and can be exercised only in the cases pointed out in the statute, and, therefore, it is necessary to aver the facts which bring the exercise within the purview of the statute. In short, the same principles are sought to be applied to the delegation and exercise of this power, intrusted to the executive of the nation for great political purposes, as might be applied to the humblest officer in the government, acting upon the most narrow and special authority. It is the opinion of the court, that this objection cannot be maintained. When the president exercises an authority confided to him by law, the presumption is, that it is exercised in pursuance of law. Every public officer is presumed to act in obedience to his duty, until the contrary is shown; and *a fortiori*, this presumption ought to be favorably applied to the chief magistrate of the union. It is not necessary to aver that the act which he may rightfully do was so done. If the fact of the existence of the exigency were averred, it would be traversable, and, of course, might be passed upon by a jury; and thus the legality of the orders of the president would depend, not on his own judgment of the facts, but upon the finding of those facts upon the proofs submitted to a jury. This view of the objection is precisely the same which was acted upon by the supreme court of New York, in the case already referred to, and, in the opinion of this court, with entire legal correctness.

Another objection is, that the orders of the president are not set forth; nor is it averred that he issued any orders, but only that the governor of New York called out the militia upon the requisition of the president. The objection, so far as it pro-

ceeds upon a supposed difference between a requisition and an order, is untenable; for a requisition calling forth the militia is, in legal intendment, an order, and must be so interpreted in this avowry. The majority of the court understood and acted upon this sense, which is one of the acknowledged senses of the word, in *Houston* v. *Moore* (5 Wheaton's Reports, 1). It was unnecessary to set forth the orders of the president at large; it was quite sufficient to state that the call was in obedience to them. No private citizen is presumed to be conversant with the particulars of those orders; and if he were, he is not bound to set them forth *in hæc verba.*

The next objection is, that it does not sufficiently appear in the avowry that the court martial was a lawfully constituted court martial, having jurisdiction of the offence at the time of passing its sentence against the original plaintiff.

Various grounds have been assigned in support of this objection. In the first place, it is said, that the original plaintiff was never employed in the service of the United States, but refused to enter that service, and that, consequently, he was not liable to the rules and articles of war, or to be tried for the offence by any court martial organized under the authority of the United States. The case of *Houston* v. *Moore* (5 Wheaton's Reports, 1) affords a conclusive answer to this suggestion. It was decided in that case, that, although a militia-man, who refused to obey the orders of the president calling him into the public service, was not, in the sense of the act of 1795, "employed in the service of the United States" so as to be subject to the rules and articles of war, yet that he was liable to be tried for the offence under the fifth section of the same act, by a court martial called under the authority of the United States. The great doubt in that case was, whether the delinquent was liable to be tried for the offence by a court martial organized under state authority.

In the next place, it is said, the court martial was not composed of the proper number of officers required by law. In order to understand the force of this objection, it is necessary to advert to the terms of the act of 1795, and the rules and articles of war.

The act of 1795 (section 5) provides "that every officer, non-commissioned officer, or private of the militia, who shall fail to obey the orders of the president of the United States, &c., shall forfeit a sum not exceeding one year's pay, and not less than one month's pay, to be determined and adjudged by a court martial." And it further provides (section 6) "that courts martial for the trial of militia shall be composed of militia officers only." These are the only provisions in the act on this subject. It is not stated by whom the courts martial shall be called, nor in what manner, nor of what number they shall be composed. But the court is referred to the sixty-fourth and sixty-fifth of the rules and articles of war, enacted by the act of 10th of April, 1806, (chapter 20,) which provide "that general courts martial may consist of any number of commissioned officers, from five to thirteen inclusively; but they shall not consist of less than thirteen, where that number can be convened without manifest injury to the service;" and that "any general officer commanding an army, or colonel commanding a separate department, may appoint general courts martial when necessary." Supposing these clauses applicable to the court martial in question, it is very clear, that the act is merely directory to the officer appointing the court, and that his decision as to the number which can be convened without manifest injury to the service, being in a manner submitted to his sound discretion, must be conclusive. But the present avowry goes further, and alleges, not only that the court martial was appointed by a general officer commanding an army, that it was composed of militia officers, naming them, but it goes on to assign the reason why a number short of thirteen composed the court, in the very terms of the sixty-fourth article; and the truth of this allegation is admitted by the demurrer. Tried, therefore, by the very test which has been resorted to in support of the objection, it utterly fails.

But, in strictness of law, the propriety of this resort may admit of question. The rules and articles of war, by the very terms of the statute of 1806, are those "by which the armies of the United States shall be governed;" and the act of 1795 has

only provided "that the militia employed in the service of the United States (not the militia ordered into the service of the United States) shall be subject to the same rules and articles of war as the troops of the United States;" and this is, in substance, re-enacted by the ninety-seventh of the rules and articles of war. It is not, therefore, admitted, that any express authority is given by either statute, that such a court martial, as is contemplated for the trial of delinquents under the fifth section of the act of 1795, is to be composed of the same number of officers, organized in the same manner, as these rules and articles contemplate for persons in actual service. If any resort is to be had to them, it can only be to guide the discretion of the officer ordering the court, as matter of usage, and not as matter of positive institution. If, then, there be no mode pointed out for the formation of the court martial in these cases, it may be asked, In what manner is such court to be appointed? The answer is,—According to the general usage of the military service, or what may not unfitly be called the customary military law. It is by the same law, that courts martial, when duly organized, are bound to execute their duties, and regulate their modes of proceeding, in the absence of positive enactments. Upon any other principle, courts martial would be left without any adequate means to exercise the authority confided to them; for there could scarcely be framed a positive code to provide for the infinite variety of incidents applicable to them.

The act of the 18th of April, 1814, (chapter 141,) which expired at the end of the late war, was, in a great measure, intended to obviate difficulties arising from the imperfection of the provisions of the act of 1795, and especially to aid courts martial in exercising jurisdiction over cases like the present. But whatever may have been the legislative intention, its terms do not extend to the declaration of the number of which such courts martial shall be composed. The first section provides "that courts martial to be composed of militia officers alone, for the trial of militia drafted, detached, and called forth, (not *or* called forth,) for the service of the United States, whether acting in

conjunction with the regular forces or otherwise, shall, when necessary, be appointed, held, and conducted, in the manner prescribed by the rules and articles of war, for appointing, holding, and conducting courts martial for the trial of delinquents in the army of the United States." This language is obviously confined to the militia in the actual service of the United States, and does not extend to such as are drafted and refuse to obey the call. So that the court are driven back to the act of 1795, as the legitimate source for the ascertainment of the organization and jurisdiction of the court martial in the present case. And we are of opinion that nothing appears on the face of the avowry to lead to any doubt that it was a legal court martial, organized according to military usage, and entitled to take cognizance of the delinquencies stated in the avowry.

This view of the case affords an answer to another objection which has been urged at the bar, namely, that the sentence has not been approved by the commanding officer, in the manner pointed out in the sixty-fifth of the rules and articles of war. That article cannot, for the reasons already stated, be drawn in aid of the argument; and the avowry itself shows that the sentence has been approved by the president of the United States, who is the commander-in-chief, and that there was not any other officer of equal grade with the major-generals by whom the court martial had been organized and continued within the military district, by whom the same could be approved. If, therefore, an approval of the sentence were necessary, that approval has been given by the highest, and, indeed, only military authority competent to give it.

But it is by no means clear, that the act of 1795 meant to require any approval of the sentences imposing fines for delinquencies of this nature. The act does not require it either expressly or by necessary implication. It directs (section seventh) that the fines assessed shall be certified by the presiding officer of the court martial to the marshal, for him to levy the same, without referring to any prior act to be done, to give validity to the sentences. The natural inference from such an omis-

sion is, that the legislature did not intend, in cases of this subordinate nature, to require any farther sanction of the sentences. And if such an approval is to be deemed essential, it must be upon the general military usage, and not from positive institution. Either way, we think that all has been done which the act required.

Another objection to the proceedings of the court martial is, that they took place, and the sentence was given, three years and more after the war was concluded, and in a time of profound peace. But the opinion of this court is, that a court martial, regularly called under the act of 1795, does not expire with the end of a war then existing, nor is its jurisdiction to try these offences in any shape dependent upon the fact of war or peace. The act of 1795 is not confined in its operation to cases of refusal to obey the orders of the president in times of public war. On the contrary, that act authorizes the president to call forth the militia to suppress insurrections, and to enforce the laws of the United States, in times of peace. And courts martial are, under the fifth section of the act, entitled to take cognizance of, and to punish delinquencies in such cases, as well as in cases where the object is to repel invasion in times of war. It would be a strained construction of the act, to limit the authority of the court to the mere time of the existence of the particular exigency, when it might be thereby unable to take cognizance of, and decide upon a single offence. It is sufficient for us to say that there is no such limitation in the act itself.

The next objection to the avowry is, that the certificate of the president of the court martial is materially variant from the sentence itself, as set forth in a prior allegation. The sentence as there set forth is, "and thereupon the said general court martial imposed the sum of ninety-six dollars as a fine on the said Jacob, for having thus failed, neglected, and refused to rendezvous and enter in the service of the United States of America, when thereto required as aforesaid." The certificate adds, "and that the said Jacob E. Mott was sentenced by the said general court martial, on failure of the payment of said

fine imposed on him, to twelve months' imprisonment." It is material to state that the averment does not purport to set forth the sentence in *hæc verba;* nor was it necessary in this avowry to allege anything more than that part of the sentence which imposed the fine, since that was the sole ground of the justification of taking the goods and chattels in controversy. But there is nothing repugnant in this averment to that which relates to the certificate. The latter properly adds the fact which respects the imprisonment, because the certificate constitutes the warrant to the marshal for his proceedings. The act of 1795 expressly declares that the delinquents "shall be liable to be imprisoned by a like sentence, on failure of payment of the fines adjudged against them, for one calendar month for every five dollars of such fine." If, indeed, it had been necessary to set forth the whole sentence at large, the first omission would be helped by the certainty of the subsequent averment. There is, then, no variance or repugnance in these allegations; but they may well stand together.

Of the remaining causes of special demurrer, some are properly matters of defence before the court martial, and its sentence, being upon a subject within its jurisdiction, is conclusive; and others turn upon niceties of pleading, to which no separate answers are deemed necessary. In general it may be said of them, that the court do not deem them well founded objections to the avowry.

Upon the whole, it is the opinion of the court, that the judgment of the court for the trial of impeachments and the correction of errors ought to be reversed, and that the cause be remanded to the same court, with directions to cause a judgment to be entered upon the pleadings in favor of the avowant.

12 Wh. 38.

OGDEN *v.* SAUNDERS.

JANUARY TERM, 1827.

[12 Wheaton's Reports, 213–369.]

Ogden lived in New York, Saunders in Kentucky; Saunders drew on Ogden certain bills of exchange, which were accepted but not paid. Ogden obtained a discharge under the insolvent law of New York which existed when the bills were accepted, and afterwards moved to Louisiana; there he was sued by Saunders in the United States district court, and judgment given for Saunders. Ogden brought the case to the supreme court.

Two questions arose; the first was this,—Does a bankrupt law which applies to contracts made after its passage impair the obligation of those contracts? Upon this, Justice Washington, Johnson, Trimble, and Thompson were of one opinion, and Marshall, Duvall, and Story of another. We give the opinions of Mr. Justice Washington and Chief Justice Marshall.

Washington, J.—The first and most important point to be decided in this cause turns essentially upon the question, whether the obligation of a contract is impaired by a state bankrupt or insolvent law, which discharges the person and the future acquisitions of the debtor from his liability under a contract entered into in that state after the passage of the act.

This question has never before been distinctly presented to the consideration of this court, and decided, although it has been supposed by the judges of a highly respectable state court, that it was decided in the case of *M'Millan* v. *M'Niel* (4 Wheaton's reports, 209). That was the case of a debt contracted by two citizens of South Carolina, in that state, the discharge of which had a view to no other state. The debtor afterwards removed to the territory of Louisiana, where he was regularly discharged, as an insolvent, from all his debts, under an act of the legislature of that state, passed prior to the time when the debt

in question was contracted. To an action brought by the creditor in the district court of Louisiana, the defendant plead in bar his discharge under the law of that territory, and it was contended by the counsel for the debtor in this court, that the law under which the debtor was discharged having passed before the contract was made, it could not be said to impair its obligation. The cause was argued on one side only, and it would seem from the report of the case, that no written opinion was prepared by the court. The chief justice stated that the circumstance of the state law, under which the debt was attempted to be discharged, having been passed before the debt was contracted, made no difference in the application of the principle which had been asserted by the court in the case of *Sturges* v. *Crowninshield.* The correctness of this position is believed to be incontrovertible. The principle alluded to was, that a state bankrupt law, which impairs the obligation of a contract, is unconstitutional in its application to such contract. In that case, it is true, the contract preceded in order of time the act of assembly under which the debtor was discharged, although it was not thought necessary to notice that circumstance in the opinion which was pronounced. The principle, however, remained in the opinion of the court, delivered in *M'Millan* v. *M'Niel.* unaffected by the circumstance, that the law of Louisiana preceded a contract made in another state, since that law, having no extra-territorial force, never did at any time govern or affect the obligation of such contract. It could not, therefore, be correctly said to be prior to the contract, in reference to its obligation; since, if, upon legal principles, it could affect the contract, that could not happen until the debtor became a citizen of Louisiana, and that was subsequent to the contract. But I hold the principle to be well established, that a discharge under the bankrupt laws of one government does not affect contracts made or to be executed under another, whether the law be prior or subsequent in the date to that of the contract; and this I take to be the only point really decided in the case alluded to. Whether the chief justice was correctly understood by the

12 Wh. 254.

reporter, when he is supposed to have said, "that this case was not distinguishable in principle from the preceding case of *Sturges* v. *Crowninshield*," it is not material at this time to inquire; because I understand the meaning of these expressions to go no farther than to intimate that there was no distinction between the cases as to the constitutional objection, since it professed to discharge a debt contracted in another state, which, at the time it was contracted, was not within its operation, nor subject to be discharged by it. The case now to be decided is that of a debt contracted in the state of New York by a citizen of that state, from which he was discharged, so far as he constitutionally could be, under a bankrupt law of that state, in force at the time when the debt was contracted. It is a case, therefore, that bears no resemblance to the one just noticed.

I come now to the consideration of the question, which, for the first time, has been directly brought before this court for judgment. I approach it with more than ordinary sensibility, not only on account of its importance, which must be acknowledged by all, but of its intrinsic difficulty, which every step I have taken, in arriving at a conclusion with which my judgment could in any way be satisfied, has convinced me attends it. I have examined both sides of this great question with the most sedulous care, and the most anxious desire to discover which of them, when adopted, would be most likely to fulfil the intentions of those who framed the constitution of the United States. I am far from asserting that my labors have resulted in entire success. They have led me to the only conclusion by which I can stand with any degree of confidence; and yet I should be disingenuous, were I to declare, from this place, that I embrace it without hesitation, and without a doubt of its correctness. The most that candor will permit me to say upon the subject is, that I see, or think I see, my way more clear on the side which my judgment leads me to adopt than on the other, and it must remain for others to decide whether the guide I have chosen has been a safe one or not.

It has constantly appeared to me, throughout the different in-

vestigations of this question to which it has been my duty to attend, that the error of those who controvert the constitutionality of the bankrupt law under consideration, in its application to this case, if they be in error at all, has arisen from not distinguishing accurately between a law which impairs a contract and one which impairs its obligation. A contract is defined by all to be an agreement to do, or not to do, some particular act; and in the construction of this agreement, depending essentially upon the will of the parties between whom it is formed, we seek for their intention with a view to fulfil it. Any law, then, which enlarges, abridges, or in any manner changes this intention when it is discovered, necessarily impairs the contract itself, which is but the evidence of that intention. The manner, or the degree, in which this change is affected, can in no respect influence this conclusion; for whether the law affect the validity, the construction, the duration, the mode of discharge, or the evidence of the agreement, it impairs the contract, though it may not do so to the same extent in all the supposed cases. Thus, a law which declares that no action shall be brought whereby to charge a person upon his agreement to pay the lebt of another, or upon an agreement relating to lands, unless the same be reduced to writing, impairs a contract made by parol, whether the law precede or follow the making of such contract; and, if the argument, that this law also impairs, in the former case, the obligation of the contract, be sound, it must follow, that the statute of frauds, and all other statutes which in any manner meddle with contracts, impair their obligation, and are, consequently, within the operation if this section and article of the constitution. It will not do to answer, that, in the particular case put, and in others of the same nature, there is no contract to impair, since the pre-existing law denies all remedy for its enforcement, or forbids the making of it; since it is impossible to deny that the parties have expressed their will in the form of a contract, notwithstanding the law denies to it any valid obligation.

This leads us to a critical examination of the particular phra-

seology of that part of the above section which relates to contracts. It is a law which impairs the obligation of contracts, and not the contracts themselves, which is interdicted. It is not to be doubted, that this term, "obligation," when applied to contracts, was well considered and weighed by those who framed the constitution, and was intended to convey a different meaning from what the prohibition would have imported without it. It is this meaning of which we are all in search.

What is it, then, which constitutes the obligation of a contract? The answer is given by the chief justice, in the case of *Sturges* v. *Crowninshield*, to which I readily assent now, as I did then; it is the law which binds the parties to perform their agreement. The law, then, which has this binding obligation, must govern and control the contract in every shape in which it is intended to bear upon it, whether it affect its validity, construction, or discharge.

But the question, Which law is referred to in the above definition? still remains to be solved. It cannot, for a moment, be conceded, that the mere moral law is intended; since the obligation which that imposes is altogether of the imperfect kind, which the parties to it are free to obey, or not, as they please. It cannot be supposed, that it was with this law the grave authors if this instrument were dealing.

The universal law of all civilized nations, which declares that men shall perform that to which they have agreed, has been supposed by the counsel, who have argued this cause for the defendant in error, to be the law which is alluded to; and I have no objection to acknowledging its obligation, whilst I must deny that it is that which exclusively governs the contract. It is upon this law that the obligation which nations acknowledge to perform their compacts with each other is founded, and I, therefore, feel no objection to answer the question asked by the same counsel,—what law it is which constitutes the obligation of the compact between Virginia and Kentucky; by admitting that it is this common law of nations which requires them to perform it. I admit further, that it is this law which creates the

obligation of a contract made upon a desert spot, where no municipal law exists, and (which was another case put by the same counsel) which contract, by the tacit assent of all nations, their tribunals are authorized to enforce.

But can it be seriously insisted, that this, any more than the moral law upon which it is founded, was exclusively in the contemplation of those who framed this constitution? What is the language of this universal law? It is simply that all men are bound to perform their contracts. The injunction is as absolute as the contracts to which it applies. It admits of no qualification, and no restraint, either as to its validity, construction, or discharge, further than may be necessary to develop the intention of the parties to the contract. And if it be true, that this is exclusively the law to which the constitution refers us, it is very apparent, that the sphere of state legislation upon subjects connected with the contract of individuals would be abridged beyond what it can for a moment be believed the sovereign states of this union would have consented to; for it will be found, upon examination, that there are few laws which concern the general police of a state, or the government of its citizens, in their intercourse with each other, or with strangers, which may not in some way or other affect the contracts which they have entered into, or may thereafter form. For what are laws of evidence, or which concern remedies, frauds, and perjuries, laws of registration, and those which affect landlord and tenant, sales at auction, acts of limitation, and those which limit the fees of professional men, and the charges of tavern keepers, and a multitude of others which crowd the codes of every state, but laws which may affect the validity, construction, or duration, or discharge of contracts? Whilst I admit, then, that this common law of nations, which has been mentioned, may form in part the obligation of a contract, I must unhesitatingly insist that this law is to be taken in strict subordination to the municipal laws of the land where the contract is made or is to be executed. The former can be satisfied by nothing short of performance; the latter may affect and con-

12 Wh. 258.

trol the validity, construction, evidence, remedy, performance, and discharge of the contract. The former is the common law of all civilized nations, and of each of them; the latter is the peculiar law of each, and is paramount to the former whenever they come in collision with each other.

It is, then, the municipal law of the state, whether that be written or unwritten, which is emphatically the law of the contract made within the state, and must govern it throughout, wherever its performance is sought to be enforced.

It forms, in my humble opinion, a part of the contract, and travels with it wherever the parties to it may be found. It is so regarded by all the civilized nations of the world, and is enforced by the tribunals of those nations according to its own forms, unless the parties to it have otherwise agreed, as where the contract is to be executed in, or refers to the laws of, some other country than that in which it is formed, or where it is of an immoral character, or contravenes the policy of the nation to whose tribunals the appeal is made; in which latter cases, the remedy, which the comity of nations affords for enforcing the obligation of contracts wherever formed, is denied. Free from these objections, this law, which accompanies the contract as forming a part of it, is regarded and enforced everywhere, whether it affect the validity, construction, or discharge of the contract. It is upon this principle of universal law, that the discharge of the contract, or of one of the parties to it, by the bankrupt laws of the country where it was made, operates as a discharge everywhere.

If, then, it be true, that the law of the country where the contract is made, or to be executed, forms a part of that contract, and of its obligation, it would seem to be somewhat of a solecism to say that it does, at the same time, impair that obligation.

But it is contended, that, if the municipal law of the state where the contract is so made form a part of it, so does that clause of the constitution which prohibits the states from passing laws to impair the obligation of contracts; and, consequently, that the law is rendered inoperative by force of its controlling as-

12 Wh. 259.

sociate. All this I admit, provided it be first proved that the law so incorporated with, and forming a part of the contract, does, in effect, impair its obligation; and before this can be proved, it must be affirmed and satisfactorily made out, that, if by the terms of the contract it is agreed, that, on the happening of a certain event, as, upon the future insolvency of one of the parties, and his surrender of all his property for the benefit of his creditors, the contract shall be considered as performed and at an end, this stipulation would impair the obligation of the contract. If this proposition can be successfully affirmed, I can only say that the soundness of it is beyond the reach of my mind to understand.

Again; it is insisted, that, if the law of the contract forms a part of it, the law itself cannot be repealed without impairing the obligation of the contract. This proposition I must be permitted to deny. It may be repealed at any time at the will of the legislature, and then it ceases to form any part of those contracts which may afterwards be entered into. The repeal is no more void than a new law would be which operates upon contracts to affect their validity, construction, or duration. Both are valid, (if the view which I take of this case be correct,) as they may affect contracts afterwards formed; but neither are so, if they bear upon existing contracts; and in the former case, in which the repeal contains no enactment, the constitution would forbid the application of the repealing law to past contracts, and to those only.

To illustrate this argument, let us take four laws, which, either by new enactments, or by the repeal of former laws, may affect contracts as to their validity, construction, evidence, or remedy.

Laws against usury are of the first description.

A law, which converts a penalty stipulated for by the parties, as the only atonement for a breach of the contract, into a mere agreement for a just compensation, to be measured by the legal rate of interest, is of the second.

The statute of frauds, and the statute of limitations, may be cited as examples of the two last.

The validity of these laws can never be questioned by those

12 Wh. 260.

who accompany me in the view which I take of the question under consideration, unless they operate, by their express provisions, upon contracts previously entered into; and even then, they are void only so far as they do so operate, because, in that case, and in that case only, do they impair the obligation of those contracts. But if they equally impair the obligation of contracts subsequently made, which they must do if this be the operation of a bankrupt law upon such contracts, it would seem to follow, that all such laws, whether in the form of new enactments, or of repealing laws, producing the same legal consequences, are made void by the constitution; and yet the counsel for the defendants in error have not ventured to maintain so alarming a proposition.

If it be conceded, that those laws are not repugnant to the constitution so far as they apply to subsequent contracts, I am yet to be instructed how to distinguish between those laws and the one now under consideration. How has this been attempted by the learned counsel who have argued this cause upon the ground of such a distinction?

They have insisted that the effect of the law first supposed is to annihilate the contract in its birth, or rather to prevent it from having a legal existence, and, consequently, that there is no obligation to be impaired. But this is clearly not so, since it may legitimately avoid all contracts afterwards entered into, which reserve to the lender a higher rate of interest than this law permits.

The validity of the second law is admitted, and yet this can only be in its application to subsequent contracts; for it has not, and I think it cannot, for a moment, be maintained, that a law, which, in express terms, varies the construction of an existing contract, or which, repealing a former law, is made to produce the same effect, does not impair the obligation of that contract.

The statute of frauds, and the statute of limitations, which have been put as examples of the third and fourth classes of laws, are also admitted to be valid, because they merely concern

the modes of proceeding in the trial of causes; the former supplying a rule of evidence, and the latter forming a part of the remedy given by the legislature to enforce the obligation, and likewise providing a rule of evidence.

All this I admit. But how does it happen, that these laws, like those which affect the validity and construction of contracts, are valid as to subsequent, and yet void as to prior and subsisting contracts? For we are informed by the learned judge who delivered the opinion of this court in the case of *Sturges* v. *Crowninshield*, that, "if, in a state where six years may be pleaded in bar to an action of assumpsit, a law should pass, declaring that contracts already in existence, not barred by the statute, should be construed within it, there could be little doubt of its unconstitutionality."

It is thus most apparent, that, whichever way we turn, whether to laws affecting the validity, construction, or discharges of contracts, or the evidence or remedy to be employed in enforcing them, we are met by this overruling and admitted distinction, between those which operate retrospectively and those which operate prospectively. In all of them, the law is pronounced to be void in the first class of cases, and not so in the second.

Let us stop, then, to make a more critical examination of the act of limitations, which, although it concerns the remedy, or, if it must be conceded, the evidence, is yet void or otherwise, as it is made to apply retroactively or prospectively, and see if it can, upon any intelligible principle, be distinguished from a bankrupt law, when applied in the same manner? What is the effect of the former? The answer is, to discharge the debtor and all his future acquisitions from his contract; because he is permitted to plead it in bar of any remedy which can be instituted against him, and consequently in bar or destruction of the obligation which his contract imposed upon him. What is the effect of a discharge under a bankrupt law? I can answer this question in no other terms than those which are given to the former question. If there be a difference, it is one which, in the eye of

12 Wh. 262.

justice at least, is more favorable to the validity of the latter than of the former; for in the one the debtor surrenders everything which he possesses towards the discharge of his obligation, and in the other he surrenders nothing, and sullenly shelters himself behind a legal objection with which the law has provided him, for the purpose of protecting his person, and his present as well as his future acquisitions, against the performance of his contract.

It is said that the former does not discharge him absolutely from his contract, because it leaves a shadow sufficiently substantial to raise a consideration for a new promise to pay. And is not this equally the case with a certificated bankrupt, who afterwards promises to pay a debt from which his certificate had discharged him? In the former case, it is said, the defendant must plead the statute in order to bar the remedy and to exempt him from his obligation. And so, I answer, he must plead his discharge under the bankrupt law, and his conformity to it, in order to bar the remedy of his creditor, and to secure to himself a like exemption. I have, in short, sought in vain for some other grounds on which to distinguish the two laws from each other than those which were suggested at the bar. I can imagine no other, and I confidently believe that none exist which will bear the test of a critical examination.

To the decision of this court, made in the case of *Sturges* v. *Crowninshield*, and to the reasoning of the learned judge who delivered that opinion, I entirely submit; although I did not then, nor can I now, bring my mind to concur in that part of it which admits the constitutional power of the state legislatures to pass bankrupt laws by which I understand, those laws which discharge the person and the future acquisitions of the bankrupt from his debts. I have always thought that the power to pass such a law was exclusively vested by the constitution in the legislature of the United States. But it becomes me to believe that this opinion was and is incorrect, since it stands condemned by the decision of a majority of this court, solemnly pronounced.

After making this acknowledgment, I refer again to the above

12 Wh. 263.

decision with some degree of confidence, in support of the opinion to which I am now inclined to come, that a bankrupt law which operates prospectively, or in so far as it does so operate, does not violate the constitution of the United States. It is there stated, "that, until the power to pass uniform laws on the subject of bankruptcies be exercised by congress, the states are not forbidden to pass a bankrupt law, provided it contain no principle which violates the tenth section of the first article of the constitution of the United States." The question in that case was, whether the law of New York, passed on the third of April, 1811, which liberates not only the person of the debtor, but discharges him from all liability for any debt contracted previous as well as subsequent to his discharge, on his surrendering his property for the use of his creditors, was a valid law under the constitution in its application to a debt contracted prior to its passage. The court decided that it was not, upon the single ground that it impaired the obligation of that contract. And if it be true, that the states cannot pass a similar law to operate upon contracts subsequently entered into, it follows inevitably, either that they cannot pass such laws at all, contrary to the express declaration of the court, as before quoted, or that such laws do not impair the obligation of contracts subsequently entered into; in fine, it is a self-evident proposition, that every contract that can be formed must either precede or follow any law by which it may be affected.

I have, throughout the preceding part of this opinion, considered the municipal law of the country where the contract is made as incorporated with the contract, whether it affects its validity, construction, or discharge. But I think it quite immaterial to stickle for this position, if it be conceded to me, what can scarcely be denied, that this municipal law constitutes the law of the contract so formed, and must govern it throughout. I hold the legal consequences to be the same, in whichever view the law, as it affects the contract, is considered.

I come now to a more particular examination and construction of the section under which this question arises; and I am

12 Wh. 264.

free to acknowledge that the collocation of the subjects for which it provides has made an irresistible impression upon my mind, much stronger, I am persuaded, than I can find language to communicate to the minds of others.

It declares that "no state shall coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts." These prohibitions, associated with the powers granted to congress, "to coin money, and to regulate the value thereof, and of foreign coin," most obviously constitute members of the same family, being upon the same subject, and governed by the same policy.

This policy was to provide a fixed and uniform standard of value throughout the United States, by which the commercial and other dealings between the citizens thereof, or between them and foreigners, as well as the monied transactions of the government, should be regulated. For it might well be asked, Why vest in congress the power to establish a uniform standard of value by the means pointed out, if the states might use the same means, and thus defeat the uniformity of the standard, and, consequently, the standard itself? And why establish a standard at all for the government of the various contracts which might be entered into, if those contracts might afterwards be discharged by a different standard, or by that which is not money, under the authority of state tender laws? It is obvious, therefore, that these prohibitions, in the tenth section, are entirely homogeneous, and are essential to the establishment of a uniform standard of value, in the formation and discharge of contracts. It is for this reason, independent of the general phraseology which is employed, that the prohibition in regard to state tender laws will admit of no construction which would confine it to state laws which have a retrospective operation.

The next class of prohibitions contained in this section consists of bills of attainder, ex post facto laws, and laws impairing the obligation of contracts.

Here, too, we observe, as I think, members of the same family brought together in the most intimate connexion with each other.

12 Wh. 265.

The states are forbidden to pass any bill of attainder or ex post facto law, by which a man shall be punished criminally or penally, by loss of life, of his liberty, property, or reputation, for an act which, at the time of its commission, violated no existing law of the land. Why did the authors of the constitution turn their attention to this subject, which, at the first blush, would appear to be peculiarly fit to be left to the discretion of those who have the police and good government of the state under their management and control? The only answer to be given is, because laws of this character are oppressive, unjust, and tyrannical; and, as such, are condemned by the universal sentence of civilized man. The injustice and tyranny which characterizes ex post facto laws consists altogether in their retrospective operation, which applies with equal force, although not exclusively, to bills of attainder.

But if it was deemed wise and proper to prohibit state legislation as to retrospective laws, which concern, almost exclusively, the citizens and inhabitants of the particular state in which this legislation takes place, how much more did it concern the private and political interests of the citizens of all the states, in their commercial and ordinary intercourse with each other, that the same prohibition should be extended civilly to the contracts which they might enter into?

If it were proper to prohibit a state legislature to pass a retrospective law which should take from the pocket of one of its own citizens a single dollar, as a punishment for an act which was innocent at the time it was committed; how much more proper was it to prohibit laws of the same character precisely, which might deprive the citizens of other states, and foreigners, as well as citizens of the same state, of thousands, to which, by their contracts, they were justly entitled, and which they might possibly have realized but for such state interference? How natural, then, was it, under the influence of these considerations, to interdict similar legislation in regard to contracts, by providing that no state should pass laws impairing the obligation of past contracts! It is true, that the two first of these prohi-

12 Wh. 266.

bitions apply to laws of a criminal, and the last to laws of a civil character; but, if I am correct in my view of the spirit and motives of these prohibitions, they agree in the principle which suggested them. They are founded upon the same reason, and the application of it is at least as strong to the last as it is to the two first prohibitions.

But these reasons are altogether inapplicable to laws of a prospective character. There is nothing unjust or tyrannical in punishing offences prohibited by law, and committed in violation of that law. Nor can it be unjust or oppressive, to declare, by law, that contracts subsequently entered into may be discharged in a way different from that which the parties have provided, but which they know, or may know, are liable, under certain circumstances, to be discharged in a manner contrary to the provisions of their contract.

Thinking, as I have always done, that the power to pass bankrupt laws was intended by the authors of the constitution to be exclusive in congress, or, at least, that they expected the power vested in that body would be exercised, so as effectually to prevent its exercise by the states, it is the more probable, that, in reference to all other interferences of the state legislatures upon the subject of contracts, retrospective laws were alone in the contemplation of the convention.

In the construction of this clause of the tenth section of the constitution, one of the counsel for the defendant supposed himself at liberty so to transpose the provisions contained in it as to place the prohibition to pass laws impairing the obligation of contracts in juxtaposition with the other prohibition to pass laws making anything but gold and silver coin a tender in payment of debts, inasmuch as the two provisions relate to the subject of contracts.

That the derangement of the words and even sentences of a law may sometimes be tolerated, in order to arrive at the apparent meaning of the legislature, to be gathered from other parts, or from the entire scope of the law, I shall not deny. But I should deem it a very hazardous rule to adopt in the construc-

tion of an instrument so maturely considered as this constitution was by the enlightened statesmen who framed it, and so severely examined and criticised by its opponents in the numerous state conventions which finally adopted it. And if, by the construction of this sentence, arranged as it is, or as the learned counsel would have it to be, it could have been made out, that the power to pass prospective laws affecting contracts was denied to the states, it is most wonderful that not one voice was raised against the provision, in any of those conventions, by the jealous advocates of state rights, nor even an amendment proposed, to explain the clause, and to exclude a construction which trenches so extensively upon the sphere of state legislation.

But, although the transposition which is contended for may be tolerated in cases where the obvious intention of the legislature can in no other way be fulfilled, it can never be admitted in those where consistent meaning can be given to the whole clause as its authors thought proper to arrange it, and where the only doubt is, whether the construction which the transposition countenances, or that which results from the reading which the legislature has thought proper to adopt, is most likely to fulfil the supposed intention of the legislature. Now although it is true, that the prohibition to pass tender laws of a particular description, and laws impairing the obligation of contracts, relate, both of them, to contracts, yet the principle which governs each of them, clearly to be inferred from the subjects with which they stand associated, is altogether different; that of the first forming part of a system for fixing a uniform standard of value, and of the last being founded on a denunciation of retrospective laws. It is, therefore, the safest course, in my humble opinion, to construe this clause of the section according to the arrangement which the convention has thought proper to make of its different provisions. To insist upon a transposition, with a view to warrant one construction rather than the other, falls little short, in my opinion, of a begging of the whole question in controversy.

But why, it has been asked, forbid the states to pass laws

making anything but gold and silver coin a tender in payment of debts contracted subsequent, as well as prior, to the law which authorizes it; and yet confine the prohibition to pass laws impairing the obligation of contracts to past contracts, or, in other words to future bankrupt laws, when the consequence resulting from each is the same, the latter being considered by the counsel as being, in truth, nothing less than tender laws in disguise?

An answer to this question has, in part, been anticipated by some of the preceding observations. The power to pass bankrupt laws having been vested in congress, either as an exclusive power, or under the belief that it would certainly be exercised, it is highly probable that state legislation upon that subject was not within the contemplation of the convention; or, if it was, it is quite unlikely that the exercise of the power by the state legislatures would have been prohibited by the use of terms which, I have endeavored to show, are inapplicable to laws intended to operate prospectively. For had the prohibition been to pass laws impairing contracts, instead of the obligation of contracts, I admit that it would have borne the construction which is contended for, since it is clear that the agreement of the parties, in the first case, would be impaired as much by a prior as it would be by a subsequent bankrupt law. It has, beside, been attempted to be shown, that the limited restriction upon state legislation, imposed by the former prohibition, might be submitted to by the states; whilst the extensive operation of the latter would have hazarded, to say the least of it, the adoption of the constitution by the state conventions.

But an answer still more satisfactory to my mind is this: tender laws, of the description stated in this section, are always unjust; and where there is an existing bankrupt law at the time the contract is made, they can seldom be useful to the honest debtor. They violate the agreement of the parties to it, without the semblance of an apology for the measure; since they operate to discharge the debtor from his undertaking, upon terms variant from those by which he bound himself, to the injury of the

creditor, and unsupported, in many cases, by the plea of necessity. They extend relief to the opulent debtor, who does not stand in need of it; as well as to the one who is, by misfortunes often unavoidable, reduced to poverty, and disabled from complying with his engagements. In relation to subsequent contracts, they are unjust when extended to the former class of debtors, and useless to the second, since they may be relieved by conforming to the requisitions of the state bankrupt law, where there is one. Being discharged by this law from all his antecedent debts, and, having his future acquisitions secured to him, an opportunity is afforded him to become once more a useful member of society.

If this view of the subject be correct, it will be difficult to prove that a prospective bankrupt law resembles, in any of its features, a law which should make anything but gold and silver coin a tender in payment of debts.

I shall now conclude this opinion by repeating the acknowledgement which candor compelled me to make in its commencement, that the question which I have been examining is involved in difficulty and doubt. But if I could rest my opinion in favor of the constitutionality of the law, on which the question arises, on no other ground than this doubt so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt. This has always been the language of this court, when that subject has called for its decision; and I know that it expresses the honest sentiments of each and every member of this bench. I am perfectly satisfied that it is entertained by those of them from whom it is the misfortune of the majority of the court to differ on the present occasion, and that they feel no reasonable doubt of the correctness of the conclusion to which their best judgment has conducted them.

My opinion is, that the judgment of the court below ought to be reversed, and judgment given for the plaintiff in error.

12 Wh. 270.

Marshall, C. J.—It is well known that the court has been divided in opinion on this case. Three judges, Mr. Justice Duvall, Mr. Justice Story, and myself, do not concur in the judgment which has been pronounced. We have taken a different view of the very interesting question which has been discussed with so much talent, as well as labor, at the bar, and I am directed to state the course of reasoning on which we have formed the opinion that the discharge pleaded by the defendant is no bar to the action.

The single question for consideration is, whether the act of the state of New York is consistent with or repugnant to the constitution of the United States?

This court has so often expressed the sentiments of profound and respectful reverence with which it approaches questions of this character as to make it unnecessary now to say more than, that, if it be right, that the power of preserving the constitution from legislative infraction should reside anywhere, it cannot be wrong, it must be right, that those on whom the delicate and important duty is conferred should perform it according to their best judgment.

Much, too, has been said concerning the principles of construction which ought to be applied to the constitution of the United States.

On this subject, also, the court has taken such frequent occasion to declare its opinion as to make it unnecessary, at least, to enter again into an elaborate discussion of it. To say that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers; is to repeat what has been already said more at large, and is all that can be necessary.

As preliminary to a more particular investigation of the clause in the constitution on which the case now under consideration

is supposed to depend, it may be proper to inquire how far it is affected by the former decisions of this court.

In *Sturges* v. *Crowninshield* it was determined, that an act, which discharged the debtor from a contract entered into previous to its passage, was repugnant to the constitution. The reasoning which conducted the court to that conclusion might, perhaps, conduct it farther; and with that reasoning (for myself alone this expression is used) I have never yet seen cause to be dissatisfied. But that decision is not supposed to be a precedent for *Ogden* v. *Saunders*, because the two cases differ from each other in a material fact; and it is a general rule, expressly recognized by the court in *Sturges* v. *Crowninshield* that the positive authority of a decision is co-extensive only with the facts on which it is made. In *Sturges* v. *Crowninshield* the law acted on a contract which was made before its passage; in this case the contract was entered into after the passage of the law.

In *M'Neil* v. *M'Millan*, the contract, though subsequent to the passage of the act, was made in a different state, by persons residing in that state and, consequently, without any view to the law the benefit of which was claimed by the debtor.

The *Farmers' and Mechanics' Bank of Pennsylvania* v. *Smith* differed from *Sturges* v. *Crowninshield* only in this, that the plaintiff and defendant were both residents of the state in which the law was enacted, and in which it was applied. The court was of opinion that this difference was unimportant.

It has, then, been decided that an act which discharges the debtor from pre-existing contracts is void; and that an act which operates on future contracts is inapplicable to a contract made in a different state, at whatever time it may have been entered into.

Neither of these decisions comprehends the question now presented to the court. It is, consequently, open for discussion.

The provision of the constitution is, that "no state shall pass any law" "impairing the obligation of contracts." The plaintiff in error contends that this provision inhibits the passage of retrospective laws only,—of such as act on contracts in exist

ence at their passage. The defendant in error maintains that it comprehends all future laws, whether prospective or retrospective, and withdraws every contract from state legislation, the obligation of which has become complete.

That there is an essential difference in principle between laws which act on past and those which act on future contracts; that those of the first description can seldom be justified, while those of the last are proper subjects of ordinary legislative discretion, must be admitted. A constitutional restriction, therefore, on the power to pass laws of the one class may very well consist with entire legislative freedom respecting those of the other. Yet, when we consider the nature of our union; that it is intended to make us, in a great measure, one people, as to commercial objects; that, so far as respects the intercommunication of individuals, the lines of separation between states are, in many respects obliterated; it would not be matter of surprise, if, on the delicate subject of contracts once formed, the interference of state legislation should be greatly abridged, or entirely forbidden. In the nature of the provision, then, there seems to be nothing which ought to influence our construction of the words; and, in making that construction, the whole clause, which consists of a single sentence, is to be taken together, and the intention is to be collected from the whole.

The first paragraph of the tenth section of the first article, which comprehends the provision under consideration, contains an enumeration of those cases in which the action of the state legislature is entirely prohibited. The second enumerates those in which the prohibition is modified. The first paragraph, consisting of total prohibitions, comprehends two classes of powers. Those of the first are political and general in their nature, being an exercise of sovereignty without affecting the rights of individuals. These are the powers "to enter into any treaty, alliance, or confederation, grant letters of marque or reprisal, coin money, emit bills of credit."

The second class of prohibited laws comprehends those whose operation consists in their action on individuals. These are laws

which make anything but gold and silver coin a tender in payment of debts, bills of attainder, ex post facto laws, or laws impairing the obligation of contracts, or which grant any title of nobility.

In all these cases, whether the thing prohibited be the exercise of mere political power, or legislative action on individuals, the prohibition is complete and total. There is no exception from it. Legislation of every description is comprehended within it. A state is as entirely forbidden to pass laws impairing the obligation of contracts, as to make treaties, or coin money. The question recurs, What is a law impairing the obligation of contracts?

In solving this question, all the acumen which controversy can give to the human mind has been employed in scanning the whole sentence, and every word of it. Arguments have been drawn from the context, and from the particular terms in which the prohibition is expressed, for the purpose, on the one part, of showing its application to all laws which act upon contracts, whether prospectively or retrospectively; and, on the other, of limiting it to laws which act on contracts previously formed.

The first impression which the words make on the mind would probably be, that the prohibition was intended to be general. A contract is commonly understood to be the agreement of the parties; and, if it be not illegal, to bind them to the extent of their stipulation. It requires reflection, it requires some intellectual effort, to efface this impression, and to come to the conclusion, that the words "contrast" and "obligation," as used in the constitution, are not used in this sense. If, however, the result of this mental effort, fairly made, be the correction of this impression, it ought to be corrected.

So much of this prohibition as restrains the power of the states to punish offenders in criminal cases, the prohibition to pass bills of attainder and ex post facto laws, is, in its very terms, confined to pre-existing cases. A bill of attainder can be only for crimes already committed; and a law is not ex post facto, unless it looks back to an act done before its passage. Language

12 Wh. 335.

is incapable of expressing in plainer terms, that the mind of the convention was directed to retroactive legislation. The thing forbidden is retroaction. But that part of the clause which relates to the civil transactions of individuals is expressed in more general terms; in terms which comprehend, in their ordinary signification, cases which occur after, as well as those which occur before, the passage of the act. It forbids a state to make anything but gold and silver coin a tender in payment of debts, or to pass any law impairing the obligation of contracts. These prohibitions relate to kindred subjects. They contemplate legislative interference with private rights, and restrain that interference. In construing that part of the clause which respects tender laws, a distinction has never been attempted between debts existing at the time the law may be passed and debts afterwards created. The prohibition has been considered as total; and yet the difference in principle between making property a tender in payment of debts contracted after the passage of the act, and discharging those debts without payment or by the surrender of property, between an absolute right to tender in payment, and a contingent right to tender in payment or in discharge of the debt, is not clearly discernible. Nor is the difference in language so obvious as to denote plainly a difference of intention in the framers of the instrument. "No state shall make anything but gold and silver coin a tender in payment of debts." Does the word "debts" mean, generally, those due when the law applies to the case, or is it limited to debts due at the passage of the act? The same train of reasoning, which would confine the subsequent words to contracts existing at the passage of the law, would go far in confining these words to debts existing at that time. Yet, this distinction has never, we believe, occurred to any person. How soon it may occur is not for us to determine. We think it would, unquestionably, defeat the object of the clause.

The counsel for the plaintiff insist that the word, "impairing," in the present tense, limits the signification of the provision to the operation of the act at the time of its passage; that

no law can be accurately said to impair the obligation of contracts, unless the contracts exist at the time. The law cannot impair what does not exist. It cannot act on nonentities.

There might be weight in this argument, if the prohibited laws were such only as operated of themselves, and immediately on the contract. But insolvent laws are to operate on a future, contingent, unforeseen event. The time to which the word "impairing" applies is not the time of the passage of the act, but of its action on the contract; that is, the time present in contemplation of the prohibition. The law, at its passage, has no effect whatever on the contract. Thus, if a note be given in New York for the payment of money, and the debtor removes out of that state into Connecticut, and becomes insolvent, it is not pretended, that his debt can be discharged by the law of New York. Consequently, that law did not operate on the contract at its formation. When, then, does its operation commence? We answer, when it is applied to the contract. Then, if ever, and not till then, it acts on the contract, and becomes a law impairing its obligation. Were its constitutionality, with respect to previous contracts, to be admitted, it would not impair their obligation until an insolvency should take place, and a certificate of discharge be granted. Till these events occur, its impairing faculty is suspended. A law, then, of this description, if it derogates from the obligation of a contract, when applied to it, is, grammatically speaking, as much a law impairing that obligation, though made previous to its formation, as if made subsequently.

A question of more difficulty has been pressed with great earnestness. It is, What is the original obligation of a contract made after the passage of such an act as the insolvent law of New York? Is it unconditional, to perform the very thing stipulated? or is the condition implied, that, in the event of insolvency, the contract shall be satisfied by the surrender of property? The original obligation, whatever that may be, must be preserved by the constitution. Any law which lessens must impair it.

12 Wh. 337.

All admit that the constitution refers to and preserves the legal, not the moral, obligation of a contract. Obligations purely moral are to be enforced by the operation of internal and invisible agents, not by the agency of human laws. The restraints imposed on states by the constitution are intended for those objects which would, if not restrained, be the subject of state legislation. What, then, was the original legal obligation of the contract now under the consideration of the court?

The plaintiff insists that the law enters into the contract so completely as to become a constituent part of it; that it is to be construed as if it contained an express stipulation to be discharged, should the debtor become insolvent, by the surrender of all his property for the benefit of his creditors, in pursuance of the act of the legislature.

This is, unquestionably, pressing the argument very far; and the establishment of the principle leads inevitably to consequences which would affect society deeply and seriously.

Had an express condition been inserted in the contract, declaring that the debtor might be discharged from it at any time by surrendering all his property to his creditors, this condition would have bound the creditor. It would have constituted the obligation of his contract; and a legislative act annulling the condition would impair the contract. Such an act would, as is admitted by all, be unconstitutional, because it operates on pre-existing agreements. If a law authorizing debtors to discharge themselves from their debts by surrendering their property enters into the contract, and forms a part of it, if it is equivalent to a stipulation between the parties, no repeal of the law can affect contracts made during its existence. The effort to give it that effect would impair their obligation. The counsel for the plaintiff perceive and avow this consequence, in effect, when they contend that to deny the operation of the law on the contract under consideration is to impair its obligation. Are gentlemen prepared to say that an insolvent law, once enacted, must, to a considerable extent, be permanent? that the legislature is incapable of varying it so far as respects existing contracts?

So, too, if one of the conditions of an obligation for the payment of money be, that, on the insolvency of the obligor, or on any event agreed on by the parties, he should be at liberty to discharge it by the tender of all or part of his property, no question could exist respecting the validity of the contract, or respecting its security from legislative interference. If it should be determined, that a law authorizing the same tender, on the same contingency, enters into and forms a part of the contract, then, a tender law, though expressly forbidden, with an obvious view to its prospective as well as retrospective operation, would, by becoming the contract of the parties, subject all contracts made after its passage to its control. If it be said, that such a law would be obviously unconstitutional and void, and, therefore, could not be a constituent part of the contract, we answer that, if the insolvent law be unconstitutional, it is equally void, and equally incapable of becoming, by mere implication, a part of the contract. The plainness of the repugnancy does not change the question. That may be very clear to one intellect, which is far from being so to another. The law now under consideration is, in the opinion of one party, clearly consistent with the constitution, and, in the opinion of the other, as clearly repugnant to it. We do not admit the correctness of that reasoning which would settle this question by introducing into the contract a stipulation not admitted by the parties.

This idea admits of being pressed still farther. If one law enters into all subsequent contracts, so does every other law which relates to the subject. A legislative act, then, declaring that all contracts should be subject to legislative control, and should be discharged as the legislature might prescribe, would become a component part of every contract, and be one of its conditions. Thus one of the most important features in the constitution of the United States, one which the state of the times most urgently required, one on which the good and the wise reposed confidently for securing the prosperity and harmony of our citizens, would lie prostrate, and be construed into an inanimate, inoperative, unmeaning clause.

12 Wh. 339.

Gentlemen are struck with the enormity of this result, and deny that their principle leads to it. They distinguish, or attempt to distinguish, between the incorporation of a general law, such as has been stated, and the incorporation of a particular law, such as the insolvent law of New York, into the contract. But will reason sustain this distinction? They say that men cannot be supposed to agree to so indefinite an article as such a general law would be, but may well be supposed to agree to an article, reasonable in itself, and the full extent of which is understood.

But the principle contended for does not make the insertion of this new term or condition into the contract to depend upon its reasonableness. It is inserted because the legislature has so enacted. If the enactment of the legislature becomes a condition of the contract because it is an enactment, then it is a high prerogative, indeed, to decide that one enactment shall enter the contract while another, proceeding from the same authority, shall be excluded from it.

The counsel for the plaintiff illustrates and supports this position by several legal principles, and by some decisions of this court, which have been relied on as being applicable to it.

The first case put is interest on a bond payable on demand which does not stipulate interest. This, he says, is not a part of the remedy, but a new term in the contract.

Let the correctness of this averment be tried by the course of proceeding in such cases.

The failure to pay according to stipulation is a breach of the contract, and the means used to enforce it constitute the remedy which society affords the injured party. If the obligation contains a penalty, this remedy is universally so regulated that the judgment shall be entered for the penalty, to be discharged by the payment of the principal and interest. But the case on which counsel has reasoned is a single bill. In this case the party who has broken his contract is liable for damages. The proceeding to obtain those damages is as much a part of the remedy as the proceeding to obtain the debt. They are claimed

in the same declaration, and as being distinct from each other. The damages must be assessed by a jury; whereas, if interest formed a part of the debt, it would be recovered as part of it. The declaration would claim it as a part of the debt; and yet, if a suitor were to declare on such a bond as containing this new term for the payment of interest, he would not be permitted to give a bond in evidence in which this supposed term was not written. Any law regulating the proceedings of courts on this subject would be a law regulating the remedy.

The liability of the drawer of a bill of exchange stands upon the same principle with every other implied contract. He has received the money of the person in whose favor the bill is drawn, and promises that it shall be returned by the drawee. If the drawee fail to pay the bill, then the promise of the drawer is broken, and for this breach of contract he is liable. The same principle applies to the endorser. His contract is not written, but his name is evidence of his promise that the bill shall be paid, and of his having received value for it. He is, in effect, a new drawer, and has made a new contract. The law does not require that this contract shall be in writing; and, in determining what evidence shall be sufficient to prove it, does not introduce new conditions not actually made by the parties. The same reasoning applies to the principle which requires notice. The original contract is not written at large. It is founded on the acts of the parties, and its extent is measured by those acts. A draws on B in favor of C, for value received. The bill is evidence that he has received value, and has promised that it shall be paid. He has funds in the hands of the drawee, and has a right to expect that his promise will be performed. He has, also, a right to expect notice of its non-performance, because his conduct may be materially influenced by this failure of the drawee. He ought to have notice that his bill is disgraced, because this notice enables him to take measures for his own security. It is reasonable that he should stipulate for this notice, and the law presumes that he did stipulate for it.

A great mass of human transactions depends upon implied

12 Wh. 340.

contracts; upon contracts which are not written, but which grow out of the acts of the parties. In such cases, the parties are supposed to have made those stipulations, which, as honest, fair, and just men, they ought to have made. When the law assumes that they have made these stipulations, it does not vary their contract, or introduce new terms into it, but declares that certain acts, unexplained by compact, impose certain duties, and that the parties had stipulated for their performance. The difference is obvious between this and the introduction of a new condition into a contract drawn out in writing, in which the parties have expressed everything that is to be done by either.

The usage of banks, by which days of grace are allowed on notes payable and negotiable in bank, is of the same character. Days of grace, from their very term, originate partly in convenience, and partly in the indulgence of the creditor. By the terms of the note, the debtor has to the last hour of the day on which it becomes payable, to comply with it; and it would often be inconvenient to take any steps after the close of day. It is often convenient to postpone subsequent proceedings till the next day. Usage has extended this time of grace generally to three days, and in some banks to four. This usage is made a part of the contract, not by the interference of the legislature, but by the act of the parties. The case cited from 9 Wheaton's Reports, 581, is a note discounted in bank. In all such cases the bank receives, and the maker of the note pays, interest for the days of grace. This would be illegal and usurious, if the money was not lent for these additional days. The extent of the loan, therefore, is regulated by the act of the parties, and this part of the contract is founded on their act. Since, by contract, the maker is not liable for his note until the days of grace are expired, he has not broken his contract until they expire. The duty of giving notice to the endorser of his failure does not arise until the failure has taken place; and consequently, the promise of the bank to give such notice is performed, if it be given when the event has happened.

The case of the *Bank of Columbia* v. *Oakley* (4 Wheaton's Re-

12 Wh. 341.

ports, 235) was one in which the legislature had given a summary remedy to the bank for a broken contract, and had placed that remedy in the hands of the bank itself. The case did not turn on the question whether the law of Maryland was introduced into the contract, but whether a party might not, by his own conduct, renounce his claim to the trial by jury in a particular case. The court likened it to submissions to arbitration, and to stipulation and forthcoming bonds. The principle settled in that case is, that a party may renounce a benefit, and that Oakley had exercised this right.

The cases from Strange and East turn upon a principle which is generally recognized, but which is entirely distinct from that which they are cited to support. It is, that a man, who is discharged by the tribunals of his own country, acting under its laws, may plead that discharge in any other country. The principle is, that laws act upon a contract, not that they enter into it, and become a stipulation of the parties. Society affords a remedy for breaches of contract. If that remedy has been applied, the claim to it is extinguished. The external action of law upon contracts, by administering the remedy for their breach, or otherwise, is the usual exercise of legislative power. The interference with those contracts, by introducing conditions into them not agreed to by the parties, would be a very unusual and a very extraordinary exercise of the legislative power, which ought not to be gratuitously attributed to laws that do not profess to claim it. If the law becomes a part of the contract, change of place would not expunge the condition. A contract made in New York would be the same in any other state as in New York, and would still retain the stipulation originally introduced into it, that the debtor should be discharged by the surrender of his estate.

It is not, we think, true, that contracts are entered into in contemplation of the insolvency of the obligor. They are framed with the expectation that they will be literally performed. Insolvency is undoubtedly a casualty which is possible, but is never expected. In the ordinary course of human transac-

tions, if even suspected, provision is made for it, by taking security against it. When it comes unlooked for, it would be entirely contrary to reason to consider it as a part of the contract.

We have, then, no hesitation in saying, that, however law may act upon contracts, it does not enter into them, and become a part of the agreement. The effect of such a principle would be a mischievous abridgment of legislative power over subjects within the proper jurisdiction of states, by arresting their power to repeal or modify such laws with respect to existing contracts.

But although the argument is not sustainable in this form, it assumes another, in which it is more plausible. Contract, it is said, being the creature of society, derives its obligation from the law; and although the law may not enter into the agreement so as to form a constituent part of it, still it acts externally upon the contract, and determines how far the principle of coercion shall be applied to it; and this being universally understood, no individual can complain justly of its application to himself, in a case where it was known, when the contract was formed.

This argument has been illustrated by references to the statutes of frauds, of usury, and of limitations. The construction of the words in the constitution respecting contracts, for which the defendants contend, would, it has been said, withdraw all these subjects from state legislation. The acknowledgment, that they remain within it, is urged as an admission, that contract is not withdrawn by the constitution, but remains under state control, subject to this restriction only, that no law shall be passed impairing the obligation of contracts in existence at its passage.

The defendants maintain that an error lies at the very foundation of this argument. It assumes that contract is the mere creature of society, and derives all its obligation from human legislation; that it is not the stipulation an individual makes which binds him, but some declaration of the supreme power of a state to which he belongs, that he shall perform what he has undertaken to perform; that, though this original declara-

tion may be lost in remote antiquity, it must be presumed as the origin of the obligation of contracts. This postulate the defendants deny, and, we think, with great reason.

It is an argument of no inconsiderable weight against it, that we find no trace of such an enactment. So far back as human research carries us, we find the judicial power, as a part of the executive, administering justice by the application of remedies to violated rights, or broken contracts. We find that power applying these remedies on the idea of a pre-existing obligation on every man to do what he has promised on consideration to do; that the breach of this obligation is an injury for which the injured party has a just claim to compensation, and that society ought to afford him a remedy for that injury. We find allusions to the mode of acquiring property, but we find no allusion, from the earliest time, to any supposed act of the governing power giving obligation to contracts. On the contrary, the proceedings respecting them, of which we know anything, evince the idea of a pre-existing intrinsic obligation which human law enforces. If, on tracing the right to contract, and the obligations created by contract, to their source, we find them to exist anterior to and independent of society, we may reasonably conclude that those original and pre-existing principles are, like many other natural rights, brought with man into society; and although they may be controlled, are not given by human legislation.

In the rudest state of nature a man governs himself, and labors for his own purposes. That which he acquires is his own, at least while in his possession, and he may transfer it to another. This transfer passes his right to that other. Hence the right to barter. One man may have acquired more skins than are necessary for his protection from the cold; another more food than is necessary for his immediate use. They agree each to supply the wants of the other from his surplus. Is this contract without obligation? If one of them, having received and eaten the food he needed, refuses to deliver the skin, may not the other rightfully compel him to deliver it? Or two per-

sons agree to unite their strength and skill to hunt together for their mutual advantage, engaging to divide the animal they shall master. Can one of them rightfully take the whole? or, should he attempt it, may not the other force him to a division? If the answer to these questions must affirm the duty of keeping faith between these parties, and the right to enforce it if violated, the answer admits the obligation of contracts, because upon that obligation depends the right to enforce them. Superior strength may give the power, but cannot give the right. The rightfulness of coercion must depend on the pre-existing obligation to do that for which compulsion is used. It is no objection to the principle, that the injured party may be the weakest. In society, the wrong-doer may be too powerful for the law. He may deride its coercive power, yet his contracts are obligatory; and if society acquire the power of coercion, that power will be applied without previously enacting that his contract is obligatory.

Independent nations are individuals in a state of nature. Whence is derived the obligation of their contracts? They admit the existence of no superior legislative power which is to give them validity, yet their validity is acknowledged by all. If one of these contracts be broken, all admit the right of the injured party to demand reparation for the injury, and to enforce that reparation if it be withheld. He may not have the power to enforce it, but the whole civilized world concurs in saying that the power, if possessed, is rightfully used.

In a state of nature, these individuals may contract, their contracts are obligatory, and force may rightfully be employed to coerce the party who has broken his engagement.

What is the effect of society upon these rights? When men unite together and form a government, do they surrender their right to contract, as well as their right to enforce the observance of contracts? For what purpose should they make this surrender? Government cannot exercise this power for individuals. It is better that they should exercise it for themselves. For what purpose, then, should the surrender be made? It can only be, that government may give it back again. As

12 Wh. 345.

we have no evidence of the surrender, or of the restoration of the right; as this operation of surrender and restoration would be an idle and useless ceremony, the rational inference seems to be that neither has ever been made; that individuals do not derive from government their right to contract, but bring that right with them into society; that obligation is not conferred on contracts by positive law, but is intrinsic, and is conferred by the act of the parties. This results from the right which every man retains to acquire property, to dispose of that property according to his own judgment, and to pledge himself for a future act. These rights are not given by society, but are brought into it. The right of coercion is necessarily surrendered to government, and this surrender imposes on government the correlative duty of furnishing a remedy. The right to regulate contracts, to prescribe rules by which they shall be evidenced, to prohibit such as may be deemed mischievous, is unquestionable, and has been universally exercised. So far as this power has restrained the original right of individuals to bind themselves by contract, it is restrained; but beyond these actual restraints the original power remains unimpaired.

This reasoning is, undoubtedly, much strengthened by the authority of those writers on natural and national law whose opinions have been viewed with profound respect by the wisest men of the present, and of past ages.

Supposing the obligation of the contract to be derived from the agreement of the parties, we will inquire how far law acts externally on it, and may control that obligation. That law may have, on future contracts, all the effect which the counsel for the plaintiff in error claim, will not be denied. That it is capable of discharging the debtor under the circumstances and on the conditions prescribed in the statute which has been pleaded in this case, will not be controverted. But as this is an operation which was not intended by the parties, nor contemplated by them, the particular act can be entitled to this operation only when it has the full force of law. A law may determine the obligation of a contract on the happening of a contingency, because

12 Wh. 346.

it is the law. If it be not the law, it cannot have this effect. When its existence as law is denied, that existence cannot be proved by showing what are the qualities of a law. Law has been defined by a writer, whose definitions especially have been the theme of almost universal panegyric, "to be a rule of civil conduct prescribed by the supreme power in a state." In our system, the legislature of a state is the supreme power, in all cases where its action is not restrained by the constitution of the United States. Where it is so restrained, the legislature ceases to be the supreme power, and its acts are not law. It is, then, begging the question to say, that, because contracts may be discharged by a law previously enacted, this contract may be discharged by this act of the legislature of New York; for the question returns upon us, Is this act a law? Is it consistent with, or repugnant to, the constitution of the United States? This question is to be solved only by the constitution itself.

In examining it, we readily admit that the whole subject of contracts is under the control of society, and that all the power of society over it resides in the state legislatures, except in those special cases where restraint is imposed by the constitution of the United States. The particular restraint now under consideration is on the power to impair the obligation of contracts. The extent of this restraint cannot be ascertained by showing that the legislature may prescribe the circumstances on which the original validity of a contract shall be made to depend. If the legislative will be, that certain agreements shall be in writing, that they shall be sealed, that they shall be attested by a certain number of witnesses, that they shall be recorded, or that they shall assume any prescribed form, before they become obligatory, all these are regulations which society may rightfully make, and which do not come within the restrictions of the constitution, because they do not impair the obligation of the contract. The obligation must exist before it can be impaired; and a prohibition to impair it when made does not imply an inability to prescribe those circumstances which shall create its obligation. The statutes of frauds, therefore, which have been

enacted in the several states, and which are acknowledged to flow from the proper exercise of state sovereignty, prescribe regulations which must precede the obligation of the contract, and, consequently, cannot impair that obligation. Acts of this description, therefore, are most clearly not within the prohibition of the constitution.

The acts against usury are of the same character. They declare the contract to be void in the beginning. They deny that the instrument ever became a contract. They deny it all original obligation; and cannot impair that which never came into existence.

Acts of limitations approach more nearly to the subject of consideration, but are not identified with it. They defeat a contract once obligatory, and may, therefore, be supposed to partake of the character of laws which impair its obligation. But a practical view of the subject will show us that the two laws stand upon distinct principles.

In the case of *Sturges* v. *Crowninshield* it was observed by the court, that these statutes relate only to the remedies which are furnished in the courts; and their language is generally confined to the remedy. They do not purport to dispense with the performance of a contract, but proceed on the presumption that a certain length of time, unexplained by circumstances, is reasonable evidence of a performance. It is on this idea alone that it is possible to sustain the decision, that a bare acknowledgment of the debt, unaccompanied with any new promise, shall remove the bar created by the act. It would be a mischief not to be tolerated, if contracts might be set up at any distance of time, when the evidence of payment might be lost, and the estates of the dead, or even of the living, be subjected to these stale obligations. The principle is, without the aid of a statute adopted by the courts as a rule of justice. The legislature has enacted no statute of limitations as a bar to suits on sealed instruments. Yet twenty years of unexplained silence on the part of the creditor is evidence of payment. On parol contracts, or on written contracts not under seal, which are con-

sidered in a less solemn point of view than sealed instruments, the legislature has supposed that a shorter time might amount to evidence of performance, and has so enacted. All have acquiesced in these enactments, but have never considered them as being of that class of laws which impair the obligation of contracts. In prescribing the evidence which shall be received in its courts, and the effect of that evidence, the state is exercising its acknowledged powers. It is likewise in the exercise of its legitimate powers, when it is regulating the remedy and mode of proceeding in its courts.

The counsel for the plaintiff in error insist that the right to regulate the remedy and to modify the obligation of the contracts are the same; that *obligation* and *remedy* are identical, that they are synonymous,—two words conveying the same idea.

The answer given to this proposition by the defendant's counsel seems to be conclusive. They originate at different times. The obligation to perform is coeval with the undertaking to perform; it originates with the contract itself, and operates anterior to the time of performance. The remedy acts upon a broken contract, and enforces a pre-existing obligation.

If there be anything in the observations made in a preceding part of this opinion respecting the source from which contracts derive their obligation, the proposition we are now considering cannot be true. It was shown, we think, satisfactorily, that the right to contract is the attribute of a free agent, and that he may rightfully coerce performance from another free agent who violates his faith. Contracts have, consequently, an intrinsic obligation. When men come into society, they can no longer exercise this original and natural right of coercion. It would be incompatible with general peace, and is, therefore, surrendered. Society prohibits the use of private, individual coercion, and gives in its place a more safe and more certain remedy. But the right to contract is not surrendered with the right to coerce performance. It is still incident to that degree of free agency which the laws leave to every individual, and the obligation of the contract is a necessary consequence of the right to

make it. Laws regulate this right, but where not regulated it is retained in its original extent. Obligation and remedy, then, are not identical; they originate at different times, and are derived from different sources.

But, although the identity of obligation and remedy be disproved, it may be, and has been, urged, that they are precisely commensurate with each other, and are such sympathetic essences, if the expression may be allowed, that the action of law upon the remedy is immediately felt by the obligation; that they live, languish and die together. The use made of this argument is to show the absurdity and self-contradiction of the construction which maintains the inviolability of obligation, while it leaves the remedy to the state governments.

We do not perceive this absurdity or self-contradiction.

Our country exhibits the extraordinary spectacle of distinct, and, in many respects, independent, governments over the same territory and the same people. The local governments are restrained from impairing the obligation of contracts, but they furnish the remedy to enforce them, and administer that remedy in tribunals constituted by themselves. It has been shown that the obligation is distinct from the remedy; and it would seem to follow, that law might act on the remedy without acting on the obligation. To afford a remedy is certainly the high duty of those who govern to those who are governed. A failure in the performance of this duty subjects the government to the just reproach of the world. But the constitution has not undertaken to enforce its performance. That instrument treats the states with the respect which is due to intelligent beings, understanding their duties, and willing to perform them; not as insane beings, who must be compelled to act for self-preservation. Its language is the language of restraint, not of coercion. It prohibits the states from passing any law impairing the obligation of contracts; it does not enjoin them to enforce contracts. Should a state be sufficiently insane to shut up or abolish its courts, and thereby withhold all remedy, would this annihilation of remedy annihilate the obligation also of contracts? We know it would

12 Wh. 350.

not. If the debtor should come within the jurisdiction of any court of another state, the remedy would be immediately applied, and the inherent obligation of the contract enforced. This cannot be ascribed to a renewal of the obligation; for passing the line of a state cannot recreate an obligation which was extinguished. It must be the original obligation derived from the agreement of the parties, and which exists unimpaired though the remedy was withdrawn.

But we are told that the power of the state over the remedy may be used to the destruction of all beneficial results from the right; and hence it is inferred, that the construction which maintains the inviolability of the obligation must be extended to the power of regulating the remedy.

The difficulty which this view of the subject presents does not proceed from the identity or connexion of right and remedy, but from the existence of distinct governments acting on kindred subjects. The constitution contemplates restraint as to the obligation of contracts, not as to the application of remedy. If this restraint affects a power which the constitution did not mean to touch, it can only be when that power is used as an instrument of hostility to invade the inviolability of contract, which is placed beyond its reach. A state may use many of its acknowledged powers in such manner as to come in conflict with the provisions of the constitution. Thus, the power over its domestic police, the power to regulate commerce purely internal, may be so exercised as to interfere with regulations of commerce with foreign nations, or between the states. In such cases, the power which is supreme must control that which is not supreme, when they come in conflict. But this principle does not involve any self-contradiction, or deny the existence of the several powers in the respective governments. So, if a state shall not merely modify or withhold a particular remedy, but shall apply it in such manner as to extinguish the obligation without performance, it would be an abuse of power which could scarcely be misunderstood, but which would not prove that remedy could not be regulated without regulating obligation.

12 Wh 351.

The counsel for the plaintiff in error put a case of more difficulty, and urge it as a conclusive argument against the existence of a distinct line dividing obligation from remedy. It is this. The law affords remedy by giving execution against the person or the property, or both. The same power which can withdraw the remedy against the person can withdraw that against the property, or that against both, and thus effectually defeat the obligation. The constitution, we are told, deals not with form, but with substance; and cannot be presumed, if it designed to protect the obligation of contracts from state legislation, to have left it thus obviously exposed to destruction.

The answer is, that, if the law goes farther, and annuls the obligation without affording the remedy which satisfies it, if its action on the remedy be such as palpably to impair the obligation of the contract, the very case arises which we suppose to be within the constitution. If it leaves the obligation untouched, but withholds the remedy, or affords one which is merely nominal, it is like all other cases of misgovernment, and leaves the debtor still liable to his creditor, should he be found, or should his property be found, where the laws afford a remedy. If that high sense of duty, which men selected for the government of their fellow-citizens must be supposed to feel, furnishes no security against a course of legislation which must end in self-destruction; if the solemn oath taken by every member, to support the constitution of the United States, furnishes no security against intentional attempts to violate its spirit while evading its letter; the question, how far the constitution interposes a shield for the protection of an injured individual who demands from a court of justice that remedy which every government ought to afford, will depend on the law itself which shall be brought under consideration. The anticipation of such a case would be unnecessarily disrespectful, and an opinion on it would be, at least, premature. But, however the question might be decided, should it be even determined that such a law would be a successful evasion of the constitution, it does not follow, that an act, which operates directly on the contract after

12 Wh. 352.

it is made, is not within the restriction imposed on the states by that instrument. The validity of a law acting directly on the obligation is not proved by showing that the constitution has provided no means for compelling the states to enforce it.

We perceive, then, no reason for the opinion, that the prohibition, "to pass any law impairing the obligation of contracts," is incompatible with the fair exercise of that discretion, which the state legislatures possess, in common with all governments, to regulate the remedies afforded by their own courts. We think that obligation and remedy are distinguishable from each other. That the first is created by the act of the parties, the last is afforded by government. The words of the restriction we have been considering countenance, we think, this idea. No state shall "pass any law impairing the obligation of contracts." These words seem to us to import that the obligation is intrinsic, that it is created by the contract itself, not that it is dependent on the laws made to enforce it. When we advert to the course of reading generally pursued by American statesmen in early life, we must suppose that the framers of our constitution were intimately acquainted with the writings of those wise and learned men whose treatises on the laws of nature and nations have guided public opinion on the subjects of obligation and contract. If we turn to those treatises, we find them to concur in the declaration, that contracts possess an original, intrinsic obligation, derived from the acts of free agents, and not given by government. We must suppose that the framers of our constitution took the same view of the subject, and the language they have used confirms this opinion.

The propositions we have endeavored to maintain, of the truth of which we are ourselves convinced, are these:—

That the words of the clause in the constitution which we are considering, taken in their natural and obvious sense, admit of a prospective, as well as of a retrospective, operation:—

That an act of the legislature does not enter into the contract, and become one of the conditions stipulated by the parties; nor does it act externally on the agreement, unless it have the full force of law:—

That contracts derive their obligation from the act of the parties, not from the grant of government; and that the right of government to regulate the manner in which they shall be formed, or to prohibit such as may be against the policy of the state, is entirely consistent with their inviolability after they have been formed:—

That the obligation of a contract is not identified with the means which government may furnish to enforce it; and that a prohibition to pass any law impairing it does not imply a prohibition to vary the remedy; nor does a power to vary the remedy imply a power to impair the obligation derived from the act of the parties.

We cannot look back to the history of the times when the august spectacle was exhibited of the assemblage of a whole people by their representatives in convention, in order to unite thirteen independent sovereignties under one government, so far as might be necessary for the purposes of union, without being sensible of the great importance which was at that time attached to the tenth section of the first article. The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the state legislatures as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. The mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with all the truly wise, as well as the virtuous, of this great community, and was one of the important benefits expected from a reform of the government.

To impose restraints on state legislation, as respected this delicate and interesting subject, was thought necessary by all those patriots who could take an enlightened and comprehen-

12 Wh. 354.

sive view of our situation; and the principle obtained an early admission into the various schemes of government which were submitted to the convention. In framing an instrument which was intended to be perpetual, the presumption is strong, that every important principle introduced into it is intended to be perpetual also; that a principle expressed in terms to operate in all future time, is intended so to operate. But, if the construction for which the plaintiff's counsel contend be the true one, the constitution will have imposed a restriction, in language indicating perpetuity, which every state in the union may elude at pleasure. The obligation of contracts in force, at any given time, is but of short duration; and, if the inhibition be of retrospective laws only, a very short lapse of time will remove every subject on which the act is forbidden to operate, and make this provision of the constitution so far useless. Instead of introducing a great principle, prohibiting all laws of this obnoxious character, the constitution will only suspend their operation for a moment, or except from it pre-existing cases. The object would scarcely seem to be of sufficient importance to have found a place in that instrument.

This construction would change the character of the provision, and convert an inhibition to pass laws impairing the obligation of contracts into an inhibition to pass retrospective laws. Had this been the intention of the convention, is it not reasonable to believe that it would have been so expressed? Had the intention been to confine the restriction to laws which were retrospective in their operation, language could have been found and would have been used, to convey this idea. The very word would have occurred to the framers of the instrument, and we should have, probably, found it in the clause. Instead of the general prohibition to pass any "law impairing the obligation of contracts," the prohibition would have been to the passage of any retrospective law. Or, if the intention had been not to embrace all retrospective laws, but those only which related to contracts, still the word would have been introduced, and the state legislatures would have been forbidden "to pass any

retrospective law impairing the obligation of contracts" or "to pass any law impairing the obligation of any contracts previously made." Words which directly and plainly express the cardinal intent always present themselves to those who are preparing an important instrument, and will always be used by them. Undoubtedly, there is an imperfection in human language, which often exposes the same sentence to different constructions. But it is rare, indeed, for a person of clear and distinct perceptions, intending to convey one principal idea, so to express himself as to leave any doubt respecting that idea. It may be uncertain, whether his words comprehend other things not immediately in his mind; but it can seldom be uncertain, whether he intends the particular thing to which his mind is specially directed. If the mind of the convention, in framing this prohibition, had been directed, not generally to the operation of laws upon the obligation of contracts, but particularly to their retrospective operation, it is scarcely conceivable that some word would not have been used indicating this idea. In instruments prepared on great consideration, general terms, comprehending a whole subject, are seldom employed to designate a particular, we might say a minute, portion of that subject. The general language of the clause is such as might be suggested by a general intent to prohibit state legislation on the subject to which that language is applied,—the obligation of contracts; not such as would be suggested by a particular intent to prohibit retrospective legislation.

It is also worthy of consideration, that those laws, which had effected all that mischief the constitution intended to prevent, were prospective, as well as retrospective, in their operation. They embraced future contracts, as well as those previously formed. There is the less reason for imputing to the convention an intention, not manifested by their language, to confine a restriction, intended to guard against the recurrence of those mischiefs, to retrospective legislation. For these reasons, we are of opinion, that, on this point, the district court of Louisiana has decided rightly.

12 Wh. 356.

After this general question was determined, came another, namely, Does a bankrupt law, which applies to contracts, made after its passage, between *a citizen of the state where the law is passed, and the citizen of another state*, impair their obligation?

Upon this question, Mr. Justice Johnson thought with Marshall, Duvall, and Story, and gave the opinion of the court as follows:—

Johnson, J.—I am instructed by the majority of the court finally to dispose of this cause. The present majority is not the same which determined the general question on the constitutionality of state insolvent laws, with reference to the violation of the obligation of contracts. I now stand united with the minority on the former question, and, therefore, feel it due to myself and the community to maintain my consistency.

The question now to be considered is, whether a discharge of a debtor under a state insolvent law would be valid against a creditor or citizen of another state, who has never voluntarily subjected himself to the state laws, otherwise than by the origin of his contract.

As between its own citizens, whatever be the origin of the contract, there is now no question to be made on the effect of such a discharge; nor is it to be questioned, that a discharge not valid under the constitution in the courts of the United States is equally invalid in the state courts. The question to be considered goes to the invalidity of the discharge altogether, and, therefore, steers clear of that provision in the constitution which purports to give validity in every state to the records, judicial proceedings, &c., of each state.

The question now to be considered was anticipated in the case of *Sturges* v. *Crowninshield*, when the court, in the close of the opinion delivered, declared that it means to confine its views to the case then under consideration, and not to commit itself as to those in which the interests and rights of a citizen of another state are implicated.

12 Wh. 357.

The question is one partly international, partly constitutional. My opinion on the subject is briefly this: that the provision in the constitution, which gives the power to the general government to establish tribunals of its own in every state, in order that the citizens of other states or sovereignties might therein prosecute their rights under the jurisdiction of the United States, had for its object an harmonious distribution of justice throughout the union; to confine the states, in the exercise of their judicial sovereignty, to cases between their own citizens; to prevent, in fact, the exercise of that very power over the rights of citizens of other states, which the origin of the contract might be supposed to give to each state; and thus, to obviate that *conflictus legum*, which has employed the pens of Huberus and various others, and which any one who studies the subject will plainly perceive it is infinitely more easy to prevent than to adjust.

These conflicts of power and right necessarily arise only after contracts are entered into. Contracts, then, become the appropriate subjects of judicial cognizance; and if the just claims which they give rise to are violated by arbitrary laws, or if the course of distributive justice be turned aside or obstructed by legislative interference, it becomes a subject of jealousy, irritation, and national complaint or retaliation.

It is not unimportant to observe, that the constitution was adopted at the very period when the courts of Great Britain were engaged in adjusting the conflicts of right which arose upon their own bankrupt law, among the subjects of that crown in the several dominions of Scotland, Ireland, and the West Indies. The first case we have on the effect of foreign discharges, that of *Ballantine* v. *Golding*, occurred in 1783, and the law could hardly be held settled before the case of *Hunter* v. *Potts*, which was decided in 1791.

Any one who will take the trouble to investigate the subject will, I think, be satisfied, that, although the British courts profess to decide upon a principle of universal law, when adjudicating upon the effect of a foreign discharge, neither the passage in

12 Wh. 358.

Vattel, to which they constantly refer, nor the practice and doctrines of other nations, will sustain them in the principle to the extent in which they assert it. It was all-important to a great commercial nation, the creditors of all the rest of the world, to maintain the doctrine, as one of universal obligation, that the assignment of the bankrupt's effects, under a law of the country of the contract, should carry the interest in his debts wherever his debtor may reside; and that no foreign discharge of his debtor should operate against debts contracted with the bankrupt in his own country. But I think it perfectly clear that in the United States a different doctrine has been established; and since the power to discharge the bankrupt is asserted on the same principle with the power to assign his debts, that the departure from it in the one instance carries with it a negation of the principle altogether.

It is vain to deny that it is now the established doctrine in England, that the discharge of a bankrupt shall be effectual against contracts of the state that gives the discharge, whatsoever be the allegiance or country of the creditor. But I think it equally clear, that this is a rule peculiar to her jurisprudence, and that reciprocity is the general rule of other countries; that the effect given to such discharge is so much a matter of comity that the states of the European continent, in all cases, reserve the right of deciding whether reciprocity will not operate injuriously upon their own citizens.

Huberus, in his third axiom on this subject, puts the effect of such laws upon the ground of courtesy, and recognizes the reservation that I have mentioned; other writers do the same.

I will now examine the American decisions on this subject; and, first, in direct hostility with the received doctrines of the British courts, it has been solemnly adjudged in this court, and, I believe, in every state court of the union, that, notwithstanding the laws of bankruptcy in England, a creditor of the bankrupt may levy an attachment on a debt due the bankrupt in this country, and appropriate the proceeds to his own debt.

In the case of *Harrison* v. *Sterry*, (5 Cranch's Reports, 298,

302,) a case decided in this court in 1809, upon full argument, and great deliberation, and in which all the English cases were quoted, it is expressly adjudged, "that, in the case of a contract made with foreigners in a foreign country, the bankrupt laws of the foreign country are incapable of operating a legal transfer of property in the United States," and judgment was given in favor of the attaching creditors, against the claim of the foreign assignees.

In that case, also, another important doctrine is established in hostility with the British doctrine. For the United States had interposed a claim against the English assignees, in order to obtain satisfaction from the proceeds of the bankrupt's effects in this country, for a debt contracted in Great Britain. And this court decreed, accordingly, expressly restricting the power of the country of the contract to its concoction and exposition.

The language of the court is, "The law of the place where a contract is made is, generally speaking, the law of the contract; that is, it is the law by which the contract is expounded. But the right of priority forms no part of the contract itself. It is extrinsic, and is rather a personal privilege, dependent on the laws of the place where the property lies, and where the court sits which decides the cause.

And, accordingly, the law of the United States was sustained, which gave the debts due the bankrupt here, to satisfy a debt contracted in England, to the prejudice of the law of England, which gave the same debt to the assignees of the bankrupt.

It cannot be necessary to go farther than this case to establish, that, so far as relates to the foreign creditor, this country does not recognize the English doctrine, that the bankrupt law of the country of the contract is paramount in disposing of the rights of the bankrupt.

The United States pass a law which asserts the right to appropriate a debt due a foreign bankrupt, to satisfying a debt due itself, and incurred by that bankrupt in his own country. The assignees of that bankrupt question this right, and claim the debt as legally vested in them by the law of the country of

the contract, and maintain that the debt due the United States, being contracted in Great Britain, was subject to the laws of Great Britain, and, therefore, entitled only to share in common with other creditors in the proceeds of the bankrupt's effects; that the debt so appropriated by the law of the United States to its exclusive benefit was, as to all the bankrupt's contracts, or certainly as to all English contracts, vested in the assignees, on international principles, principles which gave effect to the English bankrupt laws, so vesting that debt, paramount to the laws of other countries.

In giving effect to the law of the United States, this court overrules that doctrine; and in the act of passing that law, this government asserts both the power over the subject, and the right to exercise that power without a violation of national comity; or has, at least, taken its stand against that comity, and asserted a right to protect its own interests; which, in principle, is equally applicable to the interests of its own citizens.

It has had, in fact, regard to the *lex loci rei sitæ*, as existing in the person and funds of the debtor of the bankrupt, and the rights of self-preservation, and duty of protection to its own citizens, and the actual allegiance of the creditor and debtor, not the metaphysical allegiance of the contract, on which the foreign power is asserted.

It would be in vain to assign the decision of this court in *Harrison* v. *Sterry*, or the passing of the law of the United States, to the general preference which the government may assert in the payment of its own debt, since that preference can only exist to the prejudice of its own citizens, whereas the precedence there claimed and conceded operated to the prejudice of British creditors.

The case of *Baker* v. *Wheaton*, adjudged in the courts of Massachusetts, in the time of Chief Justice Parsons, (5 Massachusetts Reports, 509,) is a very strong case upon this subject. That also was argued with great care, and all the British cases reviewed; the court took time to deliberate, and the same doctrine was maintained, in the same year and the same month

with *Harrison* v. *Sterry*, and certainly without any communication between the two courts.

The case was this: one Wheaton gave a promissory note to one Chandler, both being at that time citizens and inhabitants of Rhode Island. Wheaton was discharged under the bankrupt laws of Rhode Island, both still continuing citizens and inhabitants of the same state, and the note remaining the property of Chandler. Subsequent to the discharge, Chandler endorses the note to Baker, and Wheaton is arrested in Massachusetts. He pleads the discharge in bar, and the court, in deciding, expresses itself thus: "When, therefore, the defendant was discharged from that contract, *lege loci*, the promisee was bound by that discharge, as he was a party to the laws of that state, and assenting to their operation. But if, when the contract was made, the promisee had not been a citizen of Rhode Island, he would not have been bound by the laws of it or any other state, and holding this note at the time of the discharge, he might afterwards maintain an action upon it in the courts of this state." And again, (page 311,) "If the note had been transferred to the plaintiff, a citizen of this state, whilst it remained due and undischarged by the insolvent laws of Rhode Island, those laws could not affect his rights in the courts of law in this state, because he is not bound by them."

This, it will be observed, regards a contract acknowledged to be of Rhode Island origin.

There is another case reported in the decisions of the same state, (vol. x. page 337,) which carries this doctrine still farther, and, I apprehend, to a length which cannot be maintained.

This was the case of *Watson* v. *Bourne*, in which Watson, a citizen of Massachusetts, had sued Bourne in a state court, and obtained judgment. Bourne was discharged under the insolvent laws of that state, and being afterwards found in Massachusetts was arrested on an action of debt upon the judgment. He pleads the discharge; plaintiff replies, that he, plaintiff, was a citizen of Massachusetts, and, therefore, not precluded by the discharge. The origin of the debt does not appear from the re-

port, and the argument turned wholly on the question, whether, by entering judgment in the court of the state, he had not subjected his rights to the state laws *pro tanto.*

The court overruled the plea, and recognized the doctrine in *Baker* v. *Wheaton*, by declaring "that a discharge of that nature can only operate where the law is made by an authority common to the creditor and debtor in all respects, where both are citizens or subjects."

I have little doubt that the court was wrong in denying the effect of the discharge as against judgments rendered in the state courts, when the party goes voluntarily and unnecessarily into those courts; but the decision shows, in other respects, how decidedly the British doctrine is repelled in the courts of that state.

The British doctrine is also unequivocally repelled in a very learned opinion delivered by Mr. Justice Nott, in the court of the last resort in South Carolina, and in which the whole court, consisting of the common law judges of the state, concurred. This was in the case of the *Assignees of Topham* v. *Chapman et al.*, in which the rights of the attaching creditor were maintained against those of the assignees of the bankrupt (1 Constitutional Reports, page 253); and that the same rule was recognized at an early day in the court of Pennsylvania, appears from the leading case of *Phillips* v. *Hunter*, (2 H. Blackstone's Reports, 402,) in which a British creditor, who had recovered of a debtor of the bankrupt in Pennsylvania, was compelled by the British courts to refund to the assignees in England, as for money had and received to their use.

I think it, then, fully established, that in the United States a creditor of the foreign bankrupt may attach the debt due the foreign bankrupt, and apply the money to the satisfaction of his peculiar debt, to the prejudice of the rights of the assignees or other creditors.

I do not here speak of assignees, or rights created, under the bankrupt's own deed; those stand on a different ground, and do not affect this question. I confine myself to assign-

ments, or transfers, resting on the operation of the laws of the country, independent of the bankrupt's deed; to the rights and liabilities of debtor, creditor, bankrupt, and assignees, as created by law.

What is the actual bearing of this right to attach, so generally recognized by our decisions?

It imports a general abandonment of the British principles; for, according to their laws, the assignee alone has the power to release the debtor. But the right to attach necessarily implies the right to release the debtor, and that right is here asserted under the laws of a state which is not the state of the contract.

So, also, the creditor of the bankrupt is, by the laws of his country, entitled to no more than a ratable participation in the bankrupt's effects. But the right to attach imports a right to exclusive satisfaction, if the effects so attached should prove adequate to make satisfaction.

The right to attach also imports the right to sue the bankrupt; and who would impute to the bankrupt law of another country the power to restrain the citizens of these states in the exercise of their right to go into the tribunals of their own country for the recovery of debts, wherever they may have originated? Yet, universally, after the law takes the bankrupt into its own hands, his creditors are prohibited from suing.

Thus much for the law of this case in an international view. I will consider it with reference to the provisions of the constitution.

I have said above that I had no doubt, the erection of a distinct tribunal for the resort of citizens of other states was introduced, *ex industriâ*, into the constitution, to prevent, among other evils, the assertion of a power over the rights of the citizens of other states, upon the metaphysical ideas of the British courts on the subject of jurisdiction over contracts. And there was good reason for it; for upon that principle it is that a power is asserted over the rights of creditors which involves a mere mockery of justice.

Thus, in the case of *Burrows* v. *Jemino*, (reported in 2 Strange, and better reported in Moseley, and some other books,) the creditor, residing in England, was cited, probably by a placard on a door-post in Leghorn, to appear there to answer to his debtor; and his debt passed upon by the court, perhaps, without his having ever heard of the institution of legal process to destroy it.

The Scotch, if I remember correctly, attach the summons on the flag-staff, or in the market place, at the shore of Leith; and the civil law process by proclamation, or *viis et modis*, is not much better, as the means of subjecting the rights of foreign creditors to their tribunals.

All this mockery of justice, and the jealousies, recriminations, and, perhaps, retaliations which might grow out of it, are avoided, if the power of the states over contracts, after they become the subject exclusively of judicial cognizance, is limited to the controversies of their own citizens.

And it does appear to me almost incontrovertible, that the states cannot proceed one step farther without exercising a power incompatible with the acknowledged powers of other states, or of the United States, and with the rights of the citizens of other states.

Every bankrupt or insolvent system in the world must partake of the character of a judicial investigation. Parties whose rights are to be affected are entitled to a hearing. Hence every system, in common with the particular system now before us, professes to summon the creditors before some tribunal, to show cause against granting a discharge to the bankrupt.

But on what principle can a citizen of another state be forced into the courts of a state for this investigation? The judgment to be passed is to prostrate his rights; and on the subject of these rights the constitution exempts him from the jurisdiction of the state tribunals, without regard to the place where the contract may originate. In the only tribunal to which he owes allegiance, the state insolvent or bankrupt laws cannot be carried into effect; they have a law of their own on the subject; *

* Act of congress of January 6th, 1800 (chap. 4, vol. iii. p. 301).

and a certificate of discharge under any other law would not be acknowledged as valid even in the courts of the state in which the court of the United States that grants it is held. Where is the reciprocity? Where the reason upon which the state courts can thus exercise a power over the suitors of that court, when that court possesses no such power over the suitors of the state courts?

In fact, the constitution takes away the only ground upon which this eminent dominion over particular contracts can be claimed, which is that of sovereignty. For the constitutional suitors in the courts of the United States are not only exempted from the necessity of resorting to the state tribunals, but actually cannot be forced into them. If, then, the law of the English courts had ever been practically adopted in this country in the state tribunals, the constitution has produced such a radical modification of state power over even their own contracts, in the hands of individuals not subject to their jurisdiction, as to furnish ground for excepting the rights of such individuals from the power which the states unquestionably possess over their own contracts and their own citizens.

Follow out the contrary doctrine in its consequences, and see the absurdity it will produce.

The constitution has constituted courts professedly independent of state power in their judicial course; and yet the judgments of those courts are to be vacated, and their prisoners set at large, under the power of the state courts, or of the state laws, without the possibility of protecting themselves from its exercise.

I cannot acquiesce in an incompatibility so obvious.

No one has ever imagined that a prisoner, in confinement under process from the courts of the United States, could avail himself of the insolvent laws of a state in which the court sits. And the reason is, that those laws are municipal and peculiar, and appertaining exclusively to the exercise of state power in that sphere in which it is sovereign, that is, between its own citizens, between suitors subjected to state power exclusively, in their controversies between themselves.

12 Wh. 367.

In the courts of the United States no higher power is asserted than that of discharging the individual in confinement under its own process. This affects not to interfere with the rights of creditors in the state courts against the same individual. Perfect reciprocity would seem to indicate that no greater power should be exercised under state authority over the rights of suitors who belong to the United States' jurisdiction. Even although the principle asserted in the British courts, of supreme and exclusive power over their own contracts, had obtained in the courts of the United States, I must think that power has undergone a radical modification by the judicial powers granted to the United States.

I, therefore, consider the discharge under a state law as incompetent to discharge a debt due a citizen of another state; and it follows, that the plea of a discharge here set up is insufficient to bar the rights of the plaintiff.

Judgment affirmed.

12 Wh. 368.

MASON v. HAILE.

JANUARY TERM, 1827.

[12 Wheaton's Reports, 370–383.]

Haile, being imprisoned for debt, in the state of Rhode Island, at the suit of Mason, gave bonds that he would remain in custody until "lawfully discharged." He afterwards petitioned the legislature for a discharge under an old insolvent law, which discharge he obtained. He was then sued on his bonds, it being said that the act of the legislature discharging him was unconstitutional and void.

Mr. Justice Thompson delivered the opinion of the court as follows:—

The question in this case arises upon the following certificate of a division of opinion of the judges of the circuit court of the United States for the district of Rhode Island: "This cause came on to be heard, and was argued by counsel on both sides, and thereupon the following question occurred: namely, whether, upon the amended pleas in this case, severally pleaded to the first and second counts of the plaintiff's declaration, and to which there are demurrers, and joinders in demurrer, the defendant is entitled to judgment, on the ground that the matters set forth therein, on the part of the defendant, are sufficient to bar the action; or whether the plaintiff is entitled, upon said demurrers and joinders, to judgment? Upon which question, the court was divided in opinion."

It is not understood by this court, that any question, as to

the sufficiency of the pleas, in point of form, is drawn under examination, but simply, whether, upon the merits, the matter thereby set up is sufficient to bar the action. The action is founded upon two several bonds, given by the defendant to the plaintiff, and one Bates, whom the plaintiff survives, one dated the 14th, and the other the 29th, of March, 1814. The condition in both bonds is the same, except as to dates and sums, and is as follows: "The condition of the above obligation is such, that if the above bounden Nathan Haile, now a prisoner in the state's jail in Providence, within the county of Providence, at the suit of said Mason and Bates, do, and shall from henceforth, continue to be a true prisoner, in the custody, guard, and safe keeping of Andrew Waterman, keeper of said prison, and in the custody, guard and safe keeping of his deputy, officers, and servants, or some one of them, within the limits of said prison, until he shall be lawfully discharged, without committing any manner of escape or escapes during the time of restraint, then this obligation to be void, or else to remain in full force and virtue."

The defence set up by the pleas, to show there has been no breach of the condition of the bond, is substantially, that, in June, 1814, after giving the bond in question, the defendant presented a petition to the legislature of Rhode Island, praying relief and the benefit of the insolvent act of 1756, and that, in the mean time, all proceedings against his person and estate, for the collection of debts, might be stayed, and he be liberated from jail, on giving bonds to return in case his petition should not be granted. Upon this petition, the legislature, in February, 1816, passed the following resolution: "On the petition of Nathan Haile, praying, for the reasons therein stated, that the benefit of an act, entitled, An act for the Relief of Insolvent Debtors, passed in the year 1756, be extended to him, voted, that said petition be continued until the next session of this assembly; and that, in the mean time, all proceedings against the said Haile, on account of his debts, be stayed; and that the said Haile be liberated from his present imprisonment in the

jail, in the county of Providence, on his giving sufficient bond to the sheriff of the county, conditioned to return to jail in case said petition is not granted." The defendant, after the passing of this resolution, gave the bond required by it, and, on the twenty-eighth of the same month, was discharged from imprisonment, and has ever since been at large, out of the custody of the sheriff. In February, 1816, the legislature, upon a due hearing, granted the prayer of the defendant, and passd the following resolution: "On the petition of Nathan Haile, of Foster, praying, for the reasons therein stated, that the benefit of an act, passed in June, 1756, for the relief of insolvent debtors, may be extended to him, voted, that the prayer of the said petition be, and the same is hereby granted." By the granting of the prayer of the petition the condition of the second bond given to the sheriff was complied with, and the bond became extinguished.

The defendant afterwards proceeded to take the benefit of the insolvent act revived in his favor, according to the statute provisions, and received, in due form from the proper court, a judgment "that he should be, and thereby was, fully discharged of and from all debts, contracts, and demands of every name, nature, and kind, outstanding against him, debts due to the state aforesaid or to the United States, excepted, and from all imprisonment, arrest, and restraint of his person therefor." The insolvent act of 1756 is not considered in force as a general and permanent law, but the legislature of Rhode Island has been in the constant habit of entertaining petitions like the present, and has, by the general law of 1798, (now in force,) prescribed the mode by which such petitions are to be regulated, and in case of granting the prayer of the petition, the course is to pass an act or resolution, giving the benefit of the act of 1756 to the petitioner, and thus, in effect, reviving it for his particular benefit. So that the mode pursued to obtain the discharge of the defendant, as set out in the pleas, was according to the established course of proceeding in cases of insolvency, and in conformity to the laws of Rhode Island, by which

12 Wh. 376.

the defendant was discharged from all his contracts, and from imprisonment.

The effect of this discharge upon the original judgment against Haile is not now drawn in question. The only inquiry is, whether he has violated the condition of his bonds of March, 1814, by going at large, under the authority and sanction of the resolutions of the legislature, as before stated. His bond required him to remain a true prisoner, until he should be lawfully discharged, without committing any manner of escape during the time of restraint. The bond is not that he shall remain a true prisoner until the debt shall be paid. Nor is there anything upon the face of the bond, or if we look out of it to the known and established laws and usages in that state, calling for such a construction. A lawful discharge, in its general signification, will extend to, and be satisfied by, any discharge obtained under the legislative authority of the state. And it is not unreasonable to consider such prison bonds as given subject to the ordinary and well known practice in Rhode Island, for the legislature to entertain petitions in the manner pursued by the defendant to obtain the benefit of the insolvent act of 1756, in the manner in which these petitions are received and proceeded upon, as prescribed by the act of 1798. And, indeed, this cannot strictly be considered a private contract between the parties, but rather as a statute engagement, imposed by an act of the legislature, and as a part of the process under which the defendant was held as a prisoner. And with the full knowledge of this regulation and practice, it is hardly to be presumed, that such discharges were not understood to be lawful discharges. And the same remarks will apply to the term "escape" in the bond, which can mean no more than a departure from the limits without lawful authority. Suppose the legislature, after the execution of this bond, had enlarged the jail limits? It surely would not have been an escape for the defendant to have availed himself of the enlarged limits, and gone beyond his former bounds. And yet, if the limits prescribed at the time the bond was executed are to govern the effect and

operation of the bond, it would be an escape. Such bonds may well be considered as an enlargement of the prison limits, and a mere modification of the imprisonment, according to the provisions of the laws of Rhode Island.

Can it be doubted but the legislatures of the states, so far as relates to their own process, have a right to abolish imprisonment for debt altogether, and that such law might extend to present as well as future imprisonment? We are not aware that such a power in the states has ever been questioned. And if such a general law would be valid under the constitution of the United States, where is the prohibition to be found, that denies to the state of Rhode Island the right of applying the same remedy to individual cases? This is a measure which must be regulated by the views of policy and expediency entertained by the state legislatures. Such laws act merely upon the remedy, and that in part only. They do not take away the entire remedy, but only so far as imprisonment forms a part of such remedy. The doctrine of this court in the case of *Sturges* v. *Crowninshield* (4 Wheaton's Reports, 200) applies with full force to the present case. "Imprisonment of the debtor," say the court, "may be a punishment for not performing his contract, or may be allowed as a means for inducing him to perform it. But a state may refuse to inflict this punishment, or may withhold it altogether, and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner does not impair its obligation."

In whatever light, therefore, the question is viewed, no breach of the condition of the bond, according to its true sense and interpretation, has been committed. The liberation of the defendant from confinement, on his giving bond to the sheriff to return to jail in case his petition for a discharge should not be granted, was sanctioned by the due exercise of legislative power, and was analogous to extending to him more enlarged jail limits, and would not be considered an escape. And both this and the final discharge, so far, at all events, as it related to the imprisonment of the defendant, affected the remedy in part only, and

12 Wh. 378.

was in the due and ordinary exercise of the powers vested in the legislature of Rhode Island, and was a lawful discharge, and no escape, and, of course, no breach of the condition of the bond in question.

It must, accordingly, be certified to the circuit court, that the matters set forth in the defendant's amended pleas are sufficient to bar the plaintiff's action.

12 Wh. 379.

SATTERLEE v. MATTHEWSON.

JANUARY TERM, 1829.

[2 Peters's Reports, 380–416.]

One Elisha Matthewson married the sister of one Elisha Satterlee, and with him, in 1784-5, took possession of some lands in Pennsylvania under a supposed title from the Susquehanna Company. They held the whole tract in common till 1790, when it was agreed that Matthewson should occupy all of the tract west of the Susquehanna river, holding Satterlee's portion thereof as his tenant; while Satterlee was to hold all of the tract east of the river, being Matthewson's tenant for his share of that portion. It was also agreed, that either might put an end to the tenancy at the close of any year, in which case each was to be put in possession of his share of the lands.

In 1805 Matthewson died, leaving his share of the lands to his widow during her life, and to their children afterward. Satterlee refused to give his sister possession of the part which he held of her property; but she in 1812 applied for and obtained a patent for the lands from Pennsylvania. As Satterlee, being tenant, could not, under the common law, dispute his landlord's title, he bought an old Pennsylvania claim to the lands on a patent issued in 1781, had it conveyed to his son, and, by taking advantage of a law then existing, in 1813, caused his son to eject him from the land under the old patent, without his sister being notified, and then received a lease from his son for life for the sum of one dollar; by this means throwing off his tenantship to his sister Mrs. Matthewson.

She commenced a suit against him in the court of common pleas, and his son caused himself to be made co-defendant. On the trial the verdict and judgment were in her favor, on the ground that the purchase of, and lease by, the son, was all a

trick; and that the father, being her tenant, could not dispute her title.

Satterlee took the cause to the supreme court of Pennsylvania, where it was decided, that, under the title by which Matthewson and Satterlee originally held, called a Connecticut title, the relation of landlord and tenant could not exist; and the court reversed the decision below and awarded a new trial.

Immediately after this decision the legislature of Pennsylvania passed a law enacting that the relation of landlord and tenant should exist under a Connecticut title as under any other.

When the cause came on again in the court of common pleas, this law was held binding, and verdict and judgment were again given for Mrs. Matthewson. To the opinion of the court which produced this verdict a bill of exceptions was taken, and the case tried again before the supreme court of Pennsylvania, which affirmed the judgment of the court below. Satterlee (the son, the father being dead) then brought the cause to the supreme court of the United States, on a writ of error, alleging the act of Pennsylvania, before referred to, to be unconstitutional.

The opinion of the court was delivered by Judge Washington as follows:—

This is a writ of error to the supreme court of Pennsylvania. An ejectment was commenced by the defendant in error in the court of common pleas against Elisha Satterlee to recover the land in controversy, and, upon the motion of the plaintiff in error, he was admitted, as her landlord, a defendant to the suit. The plaintiff at the trial set up a title under a warrant dated the 10th of January, 1812, founded upon an improvement in the year 1785, which, it was admitted, was under a Connecticut title, and a patent bearing date the 19th of February, 1813.

The defendant claimed title under a patent issued to Wharton in the year 1781, and a conveyance by him to John F.

Satterlee, in April, 1812. It was contended on the part of the plaintiff, that, admitting the defendant's title to be the oldest and best, yet he was stopped from setting it up in that suit, as it appeared in evidence that he had come into possession as tenant to the plaintiff some time in the year 1790. The court of common pleas decided in favor of the plaintiff upon the ground just stated, and judgment was accordingly rendered for her. Upon a writ of error to the supreme court of that state, that court decided, in June, 1825, (13 Sergeant and Rawle's Reports, 133,) that, by the settled law of Pennsylvania, the relation of landlord and tenant could not subsist under a Connecticut title; upon which ground the judgment was reversed, and a *venire facias de novo* was awarded.

On the 8th of April, 1826, and before the second trial of this cause took place, the legislature of that state passed a law in substance as follows, namely, "that the relation of landlord and tenant shall exist, and be held as fully and effectually between Connecticut settlers and Pennsylvania claimants as between other citizens of this commonwealth, on the trial of any cause now pending, or hereafter to be brought within this commonwealth, any law or usage to the contrary notwithstanding."

Upon the retrial of this cause in the inferior court, in May, 1826, evidence was given conducing to prove that the land in dispute was purchased of Wharton by Elisha Satterlee, the father of John F. Satterlee, and that by his direction the conveyance was made to the son. It further appeared in evidence, that the son brought an ejectment against his father in the year 1813, and by some contrivance between those parties, alleged by the plaintiff below to be merely colorable and fraudulent, for the purpose of depriving her of her possession, obtained a judgment and execution thereon, under which the possession was delivered to the plaintiff in that suit, who immediately afterwards leased the premises to the father for two lives, at a rent of one dollar per annum. The fairness of the transactions was made a question on the trial, and it was asserted by the

plaintiff, that, notwithstanding the eviction of Elisha Satterlee under the above proceedings, he still continued to be her tenant.

The judge, after noticing in his charge the decision of the supreme court in 1825, and the act of assembly before recited, stated to the jury the general principle of law, which prevents a tenant from controverting the title of his landlord by showing it to be defective, the exception to that principle where the landlord claims under a Connecticut title, as laid down by the above decision, and the effect of the act of assembly upon that decision, which act he pronounced to be binding on the court. He, therefore, concluded, and so charged the jury, that, if they should be satisfied, from the evidence, that the transactions between the two Satterlees before mentioned were *bona fide*, and that John F. Satterlee was the actual purchaser of the land, then the defendants might set up the eviction as a bar to the plaintiff's recovery as landlord. But that, if the jury should be satisfied that those transactions were collusive, and that Elisha Satterlee was in fact the real purchaser, and the name of his son inserted in the deed for the fraudulent purpose of destroying the right of the plaintiff as landlord; then the merely claiming under a Connecticut title would not deprive her of her right to recover in that suit.

To this charge, of which the substance only has been stated, an exception was taken, and the whole of it is spread upon the record. The jury found a verdict for the plaintiff; and judgment being rendered for her, the cause was again taken to the supreme court by a writ of error.

The only question which occurs in this cause, which it is competent to this court to decide, is, whether the statute of Pennsylvania, which has been mentioned, of the 8th of April, 1826, is or is not objectionable, on the ground of its repugnancy to the constitution of the United States. But before this inquiry is gone into, it will be proper to dispose of a preliminary objection made to the jurisdiction of this court, upon the ground, that there is nothing apparent on this record to raise that question, or otherwise to bring this case within any of the provisions of the twenty-fifth section of the judiciary act of 1789.

Questions of this nature have frequently occurred in this court, and have given occasion for a critical examination of the above section, which has resulted in the adoption of certain principles of construction applicable to it, by which the objection now to be considered may without much difficulty, be decided.* One of those principles is, that, if it sufficiently appear from the record itself, that the repugnancy of a statute of a state to the constitution of the United States was drawn into question, or that that question was applicable to the case, this court has jurisdiction of the cause under the section of the act referred to; although the record should not, in terms, state a misconstruction of the constitution of the United States, or that the repugnancy of the statute of the state to any part of that constitution was drawn into question.

Now it is manifest from this record, not only that the constitutionality of the statute of the 8th of April, 1826, was drawn into question, and was applicable to the case, but that it was so applied by the judge, and formed the basis of his opinion to the jury, that they should find in favor of the plaintiff, if in other respects she was entitled to a verdict. It is equally manifest that the right of the plaintiff to recover in that action depended on that statute; the effect of which was to change the law, as the supreme court had decided it to be in this very case in the year 1825. (13 Sergeant and Rawle, 133.)

That the charge of the judge forms a part of this record is unquestionable. It was made so by the bill of exceptions, and would have been so without it, under the statute of the 24th of February, 1806, of that state; which directs, that, in all cases in which the opinion of the court shall be delivered, if either party require it, it is made the duty of the judges to reduce the opinion, with their reasons therefor, to writing, and to file the same of record in the cause. In the case of *Downing* v. *Baldwin*, (1 Sergeant and Rawle, 298,) it was decided by the supreme court of Pennsylvania, that the opinion so filed becomes

* 2 Wheaton's Reports, 363; 4 Wheaton's Reports, 311; 12 Wheaton's Reports, 117.

2 Pet. 410.

part of the record, and that any error in it may be taken advantage of on a writ of error without a bill of exceptions.

It will be sufficient to add that this opinion of the court of common pleas was, upon a writ of error, adopted and affirmed by the supreme court; and it is the judgment of that court upon the point so decided by the inferior court, and not the reasoning of the judges upon it, which this court is now called upon to revise.

We come now to the main question in this cause. Is the act which is objected to repugnant to any provision of the constitution of the United States? It is alleged to be so by the counsel for the plaintiff in error, for a variety of reasons; and particularly, because it impairs the obligation of the contract between the state of Pennsylvania and the plaintiff who claims title under her grant to Wharton, as well as of the contract between Satterlee and Matthewson, because it creates a contract between parties where none previously existed, by rendering that a binding contract which the law of the land had declared to be invalid; and because it operates to divest and destroy the vested rights of the plaintiff. Another objection relied upon is, that, in passing the act in question, the legislature exercised those functions which belong exclusively to the judicial branch of the government.

Let these objections be considered. The grant to Wharton bestowed upon him a fee simple estate in the land granted, together with all the rights, privileges, and advantages which, by the laws of Pennsylvania, that instrument might legally pass. Were any of those rights, which, it is admitted, vested in his vendee or alienee, disturbed, or impaired, by the act under consideration? It does not appear from the record, or even from the reasoning of the judges of either court, that they were in any instance denied, or even drawn into question. Before Satterlee became entitled to any part of the land in dispute under Wharton, he had voluntarily entered into a contract with Matthewson, by which he became his tenant, under a stipulation that either of the parties might put an end to the ten-

ancy at the termination of any one year. Under this new contract, which, if it was ever valid, was still subsisting and in full force at the time when Satterlee acquired the title of Wharton, he exposed himself to the operation of a certain principle of the common law, which estopped him from controverting the title of his landlord, by setting up a better title to the land in himself, or one outstanding in some third person.

It is true that the supreme court of the state decided, in the year 1825, that this contract, being entered into with a person claiming under a Connecticut title, was void; so that the principle of law which has been mentioned did not apply to it. But the legislature afterwards declared by the act under examination, that contracts of that nature were valid, and that the relation of landlord and tenant should exist, and be held effectual, as well in contracts of that description, as in those between other citizens of the state.

Now this law may be censured, as it has been, as an unwise and unjust exercise of legislative power; as retrospective in its operation; as the exercise, by the legislature, of a judicial function; and as creating a contract between parties where none previously existed. All this may be admitted; but the question which we are now considering is, Does it impair the obligation of the contract between the state and Wharton, or his alienee? Both the decision of the supreme court, in 1825, and this act, operate not upon that contract, but upon the subsequent contract between Satterlee and Matthewson. No question arose, or was decided to disparage the title of Wharton, or of Satterlee as his vendee. So far from it, that the judge stated in his charge to the jury, that, if the transactions between John F. Satterlee and Elisha Satterlee were fair, then the elder title of the defendant must prevail, and he would be entitled to a verdict.

We are, then, to inquire whether the obligation of the contract between Satterlee and Matthewson was impaired by this statute. The objections urged at the bar, and the arguments in support of them, apply to that contract, if to either. It is

2 Pet. 412.

that contract which the act declared to be valid, in opposition to the decision of the supreme court; and admitting the correctness of that decision, it is not easy to perceive how a law, which gives validity to a void contract, can be said to impair the obligation of that contract. Should a statute declare, contrary to the general principles of law, that contracts founded upon an illegal or immoral consideration, whether in existence at the time of passing the statute, or which might hereafter be entered into, should nevertheless be valid and binding upon the parties; all would admit the retrospective character of such an enactment, and that the effect of it was to create a contract between parties where none had previously existed. But it surely cannot be contended, that to create a contract, and to destroy or impair one, mean the same thing.

If the effect of the statute in question be not to impair the obligation of either of those contracts, and none other appear upon this record, is there any other part of the constitution of the United States to which it is repugnant? It is said to be retrospective. Be it so; but retrospective laws, which do not impair the obligation of contracts, or partake of the character of ex post facto laws, are not condemned or forbidden by any part of that instrument.

All the other objections which have been made to this statute admit of the same answer. There is nothing in the constitution of the United States which forbids the legislature of a state to exercise judicial functions. The case of *Ogden* v. *Blackledge* came into this court from the circuit court of the United States, and not from the supreme court of North Carolina; and the question, whether the act of 1799, which partook of a judicial character, was repugnant to the constitution of the United States, did not arise, and, consequently, was not decided. It may safely be affirmed, that no case has ever been decided in this court, upon a writ of error to a state court, which affords the slightest countenance to this objection.

The objection, however, which was most pressed upon the court, and relied upon by the counsel for the plaintiff in error, was, that the effect of this act was to divest rights which were

vested by law in Satterlee. There is certainly no part of the constitution of the United States which applies to a state law of this description; nor are we aware of any decision of this, or of any circuit court, which has condemned such a law upon this ground, provided its effect be not to impair the obligation of a contract; and it has been shown, that the act in question has no such effect upon either of the contracts which have been before mentioned.

In the case of *Fletcher* v. *Peck*, it was stated by the chief justice, that it might well be doubted, whether the nature of society and of government do not prescribe some limits to the legislative power; and he asks, "if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?" It is nowhere intimated in that opinion, that a state statute, which divests a vested right, is repugnant to the constitution of the United States; and the case in which that opinion was pronounced was removed into this court by writ of error, not from the supreme court of a state, but from a circuit court.

The strong expressions of the court upon this point, in the cases of *Vanhorne's Lessee* v. *Dorrance*, and *The Society for the Propagation of the Gospel* v. *Wheeler*, were founded expressly on the constitution of the respective states in which those cases were tried.

We do not mean in any respect to impugn the correctness of the sentiments expressed in those cases, or to quetion the correctness of a circuit court sitting to administer the laws of a state, in giving to the constitution of that state a paramount authority over a legislative act passed in violation of it. We intend to decide no more than that the statute objected to in this case is not repugnant to the constitution of the United States, and that, unless it be so, this court has no authority, under the twenty-fifth section of the judiciary act, to re-examine and to reverse the judgment of the supreme court of Pennsylvania in the present case.

That judgment, therefore, must be affirmed with costs.

2 Pet. 414.

CONSTITUTION

OF THE

UNITED STATES.

We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

SECTION I.

All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives.

SECTION II.

The house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

Representatives and direct taxes shall be apportioned among the several states, which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative; and until such enumeration shall be made, the state of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

The house of representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

SECTION III.

The senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote.

Immediately after they shall be assembled in consequence of the first election, they shall be divided, as equally as may be, into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appoint-

ments until the next meeting of the legislature, which shall then fill such vacancies.

No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

The vice-president of the United States shall be president of the senate, but shall have no vote, unless they be equally divided.

The senate shall choose their other officers, and also a president pro tempore, in the absence of the vice-president, or when he shall exercise the office of president of the United States.

The senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside. And no person shall be convicted without the concurrence of two-thirds of the members present.

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment and punishment, according to law.

SECTION IV.

The times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the congress may, at any time, by law, make or alter such regulations, except as to the places of choosing senators.

The congress shall assemble at least once in every year; and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SECTION V.

Each house shall be the judge of the elections, returns, and qualifications of its own members; and a majority of each shall

constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each house may provide.

Each house may determine the rules of its proceedings; punish its members for disorderly behavior; and, with the concurrence of two-thirds, expel a member.

Each house shall keep a journal of its proceedings; and, from time to time, publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either house, on any question, shall, at the desire of one-fifth of those present, be entered on the journal.

Neither house, during the session of congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

SECTION VI.

The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest, during their attendance at the session of their respective houses, and in going to or returning from the same; and for any speech or debate in either house they shall not be questioned in any other place.

No senator or representative shall, during the time for which he was elected, be appointed to any civil office, under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person, holding any office under the United States, shall be a member of either house, during his continuance in office.

SECTION VII.

All bills for raising a revenue shall originate in the house of representatives; but the senate may propose or concur with amendments, as on other bills.

Every bill, which shall have passed the house of representatives and the senate, shall, before it become a law, be presented to the president of the United States; if he approve he shall sign it, but if not he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the congress by their adjournment prevent its return, in which case it shall not be a law.

Every order, resolution, or vote, to which the concurrence of the senate and house of representatives may be necessary, (except on a question of adjournment,) shall be presented to the president of the United States; and, before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be re-passed by two-thirds of the senate and house of representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION VIII.

The congress shall have power,—

To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States:

To borrow money on the credit of the United States:

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes:

To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States:

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures:

To provide for the punishment of counterfeiting the securities and current coin of the United States:

To establish post-offices and post-roads:

To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors the exclusive right to their respective writings and discoveries:

To constitute tribunals inferior to the supreme court:

To define and punish piracies and felonies committed on the high seas, and offences against the law of nations:

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water:

To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years:

To provide and maintain a navy:

To make rules for the government and regulation of the land and naval forces:

To provide for calling forth the militia to execute the laws of the union, suppress insurrections, and repel invasions:

To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States; reserving to the states respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress:

To exercise exclusive legislation, in all cases whatsoever, over such districts (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings:

And to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

SECTION IX.

The migration or importation of such persons, as any of the states now existing shall think proper to admit, shall not be prohibited by the congress prior to the year one thousand eight hundred and eight; but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.

No bill of attainder or *ex post facto* law shall be passed.

No capitation or other direct tax shall be laid, unless in proportion to the *census* or enumeration herein before directed to be taken.

No tax or duty shall be laid on articles exported from any state. No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties, in another.

No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States; and no person, holding any office of profit or trust under them, shall, without the consent of the congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state.

SECTION X.

No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit

bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; or grant any title of nobility.

No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress. No state shall, without the consent of congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II.

SECTION I.

The executive power shall be vested in a president of the United States of America. He shall hold his office during the term of four years, and, together with the vice-president, chosen for the same term, be elected as follows:

Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in the congress; but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

[The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit, sealed, to the seat of the government of the United States,

directed to the president of the senate. The president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the president, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the house of representatives shall immediately choose by ballot one of them for president; and if no person have a majority, then from the five highest on the list the said house shall in like manner choose the president. But in choosing the president the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the president, the person having the greatest number of votes of the electors shall be the vice-president. But if there should remain two or more who have equal votes, the senate shall choose from them by ballot the vice-president.]*

The congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

No person, except a natural born citizen, or a citizen of the United States, at the time of the adoption of this constitution, shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president; and the congress may by law provide for the case of removal, death, resignation, or inability, both of the president and vice-president, declaring what officer shall then act as president; and such officer shall act accordingly, until the disability be removed, or a president shall be elected.

* Amendment XII. a substitute for this paragraph.

The president shall at stated times, receive, for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States or any of them.

Before he enter on the execution of his office, he shall take the following oath or affirmation:

"I do solemnly swear (or affirm) that I will faithfully execute the office of president of the United States, and will, to the best of my ability, preserve, protect, and defend the constitution of the United States."

SECTION II.

The president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States. He may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices. And he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur. And he shall nominate, and by and with the advice and consent of the senate, shall appoint, ambassadors, other public ministers, and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the congress may by law vest the appointment of such inferior officers, as they shall think proper, in the president alone, in the courts of law, or in the heads of departments.

The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions, which shall expire at the end of their next session.

SECTION III.

He shall, from time to time, give to the congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient. He may, on extraordinary occasions, convene both houses, or either of them; and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper. He shall receive ambassadors and other public ministers. He shall take care that the laws be faithfully executed; and shall commission all the officers of the United States.

SECTION IV.

The president, vice-president, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III.

SECTION I.

The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

SECTION II.

The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to

controversies between two or more states, between a state and citizens of another state,* between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects.

In all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.

SECTION III.

Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

ARTICLE IV.

SECTION I.

Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

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* See Amendment XI.

SECTION II.

The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

SECTION III.

New states may be admitted by the congress into this union; but no new state shall be formed or erected within the jurisdiction of any other state, nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the congress.

The congress shall have power to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

SECTION IV.

The United States shall guaranty to every state in this union a republican form of government, and shall protect each of them against invasion, and, on application of the legislature, or of the executive, (when the legislature cannot be convened,) against domestic violence.

ARTICLE V.

The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or,

on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid, to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress: Provided, that no amendment, which may be made prior to the year one thousand eight hundred and eight, shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate.

ARTICLE VI.

All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution as under the confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound, by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII.

The ratification of the conventions of nine states shall be sufficient for the establishment of this Constitution between the states so ratifying the same.

AMENDMENTS TO THE CONSTITUTION.

ARTICLE I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II.

A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III.

No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment by a

grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger. Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. Nor shall private property be taken for public use without just compensation.

ARTICLE VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.

ARTICLE VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined, in any court of the United States, than according to the rules of common law.

ARTICLE VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX.

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

ARTICLE X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

ARTICLE XI.

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

ARTICLE XII.

1. The electors shall meet in their respective states, and vote by ballot for president and vice-president, one of whom, at least, shall not be an inhabitant of the same state with themselves. They shall name in their ballots the person voted for as president and in distinct ballots the person voted for as vice-president; and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice-president, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate. The president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes for president shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote.

A quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president, whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice-president shall act as president, as in the case of the death or other constitutional disability of the president.

2. The person having the greatest number of votes as vice-president shall be the vice-president, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list the senate shall choose the vice-president. A quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice.

3. But no person, constitutionally ineligible to the office of president, shall be eligible to that of vice-president of the United States.

GLOSSARY AND INDEX.

GLOSSARY.

ACTION ON THE CASE.—A general action given for redress of wrongs and injuries, done without force, and not particularly provided against by law, in order to have satisfaction for damage.

ASSUMPSIT.—Is taken for a voluntary promise, by which a man *assumes* or takes upon him to perform or pay anything to another. An action upon the case on assumpsit is an action the law gives the party injured by the breach or non-performance of a contract either express or implied.

CHOSE IN ACTION.—A cause of suit for any debt, duty, or wrong.

CORAM NON JUDICE.—When a cause is brought and determined in a court, whereof the judges have not any jurisdiction, it is said to be *coram non judice*, and void.

DEMURRER.—An issue upon matter of law. It confesses the facts to be true, as stated by the opposite party; but denies, that, by the law arising upon those facts, any injury is done to the plaintiff, or that the defendant has made out a lawful excuse, according to the party which first *demurs*, (Fr. *demeurer*) that is, rests or abides in law upon the point in question.

DETINUE.—An action for something *detained;* it is for the specific thing, and not merely for its value.

DISTRAIN.—To distrain is to seize legally certain property, to force payment of a debt. To attach is to take certain property, to sell it, and so pay the debt; to distrain or distress is to act upon the debtor by distressing him, he having the right, under certain regulations, to redeem or *replevy* the property seized; if he does not do this, it is sold.

EJECTMENT.—An action by which one seeks to *eject* or oust another from land which he claims.

ERROR, WRIT OF.—See pp. 221 and 246.

EX PARTE PROCEEDINGS.—See p. 33.

FEMES COVERTS.—Married women.

HABEAS CORPUS.—See pp. 33, 36.

INDENTS.—A writing containing some contract or conveyance between two or more persons, so called from being cut or *indented* at the top or side in such a manner as to tally or correspond with another writing having the same contents; the object of the indentation being to prevent forgery.

INJUNCTION.—See p. 287.

IN PAIS.—This term means *in the country*, and refers to the transfer of property by deed, made, by the old law, on the spot.

INTERLOCUTORY.—An interlocutory judgment or decree is one which is given on some point intermediate or incidental to the main question at issue. Also, an incomplete judgment, whereby the right of the plaintiff to recover is established, but the amount of damages is left to be ascertained by a jury.

LIBEL.—To libel a vessel is to secure her, or attach her, for some claim; under the libel the court holds her until it is determined whose property she is.

LIVERY.—Same with delivery.

MANDAMUS.—See pp. 1 and 16.

MESNE.—Not final, but intermediate.

MISPRISION OF FELONY.—Concealment of, without participation in, a crime.

MOVE THE COURT.—See p. 33.

NON-USER.—Neglect to use.

OYER.—Hearing.

PLEADINGS.—When a man begins a suit he declares his cause of action; the one sued then pleads his ground of defence, and so on; the various papers which thus declare and plead are called the pleadings in the case.

QUI TAM ACTION.—An action brought by an informer for himself and the public.

REPLEVIN.—An action brought to recover goods and chattels unlawfully taken from the possession of the plaintiff, in which he has a general or special property.

RES INTEGRA.—A new point.

RULE.—See p. 1.

SERIATIM.—Separately.

SOUNDING IN DAMAGES.—An action claiming damages for something injured or retained, and not the thing itself, is said to sound in damages.

SPECIAL VERDICT.—A general verdict says, "Guilty" or "Not guilty;" a special verdict says, "We find such and such facts, if the law be so and so, then he is guilty," or, "he should pay," as the case may be.

TRAVERSABLE.—That is traversable which may be denied in legal form, so as to raise a jury-question.

TROVER.—An action claiming the value of property which the claimant says was *found* (Fr. *trouver*).

VENIRE FACIAS DE NOVO.—A new trial.

INDEX.

Page.

ACCESSORY, see "United States v. Burr" 53–111
cannot be tried till the principal has been convicted, unless by special provision by statute, or by his own request 104
ACT OF CONGRESS, judicial 21, 34, 112, 382, 391, 395, 424, 546, 550, 571, 686
does not authorize suits against the United States . . . 248
prescribing the duties of the secretary of state 4
regulating duties on imports, &c. . . 454
giving effect to the laws of Maryland, in the District of Columbia, construction of . 556
of 1795, providing for repelling invasions, &c. 611
ACT OF INCORPORATION, is a contract 207
the object of 408
AFFIDAVIT, when admissible as a foundation for a commitment . 45, 47
AGENT for fortifications, see "The United States v. Maurice et al." . 465
office of, whether established by law . . 469–474
duties of 471
APPOINTMENT to office, see "Marbury v. Madison" . . . 1–16
AUTHORITY of a decision is coëxtensive with what . . . 641

BANK OF THE UNITED STATES—
the first, could sue and be sued in what courts . . . 113, 118
the president and directors of, liable to be sued, when, and in what courts 113
the second, might sue in the circuit courts of the U. S. 317, 344, 347
the act incorporating it was constitutional . . 178
had power to establish branches . . . 178
was not liable to be taxed by the states . . 187, 340
the property acquired by, was liable to be taxed . 388
essential to the fiscal operations of the government 388

BANKRUPT LAW, Congress authorized to pass . . . 147
the states may pass 151
when void 633, 641

Page

BANKRUPT LAW, *Continued.*
does not necessarily impair the obligation of contracts subsequently entered into . . 622–639
of England and the continent of Europe . 667
effect of a discharge under . . . 668–673
discharge of a contract, under . . . 628
BILL OF CREDIT, what 397, 398
includes certificates given for money borrowed . 397, 398
is not a valuable consideration for a note . 402, 403
BOND, may be void in part, and valid in part 354
post-office, act of Congress concerning 355
remedy upon, when given by officers of the United States . 474, 476
may be taken with sureties, when 479
is an admission that it is given for a debt, and need not show how the debt is contracted 479, 481
though a bond should not be obligatory as an official bond, a suit may be maintained on it to coërce the payment of money 481

CARRIAGES, the tax, or duty, laid on, by the act of Congress, June 5, 1794, was not a *direct* tax 490
CHARTER, a *contract* 207
colonial charters by the king of Great Britain, their purport 428
CITATION to bring a party before the supreme court of the United States, by whom to be signed 420
on whom to be served, and how and when to be returned 420
CITIZEN, this term ought to be understood, how . . . 118
COLUMBIA, DISTRICT OF, is not a state 31
a direct tax may be laid and collected, in 217
COMMERCE, what, and comprehends what 290
Congress may regulate 290
power to regulate commerce, what . . . 295
extends to what . . 369
states cannot interfere with the regulation of . . 370
the power to regulate commerce includes the power to regulate navigation 457
COMMISSION of officers of the United States, to be signed by the president. 3, 4
must be recorded by the secretary of state . . 9
is complete, when 6, 10
CONGRESS, of the colonies—authority, power and acts of . . 443
of the confederation 444
of the United States, the powers conferred on it by the constitution 444
may regulate passenger vessels, as well as others . 309
the duty of, in relation to the judicial department . 529

Page

CONSTITUTION of the U. States, when the government under, commenced . . . 219
was ordained and established by the people of the U. States . 526, 532
for what purpose established . 449
was formed in and for an advanced state of society . . 607
is the supreme law of the land 24, 28, 179
controls any legislative act which is repugnant to it . . 24
was designed to operate upon the states in their corporate capacities 540
does not forbid state legislatures to exercise judicial functions . 690
nothing in, on the subject of *navigation* 457
construction of . 288–290, 527, 659
Art. 1, Sec. 20 . . 212
Art. 1, Sec. 8 147, 169, 212, 368, 415, 456, 597, 599, 611
Art. 1, Sec. 9 . . 457
Art. 1, Sec. 10 136, 151–159, 191, 358–368, 624–639, 642
Art. 2, Sec. 2 and 3 3, 467, 470
Art. 3 . 223, 413, 528–532
Amendment 5 . 449-453
Amendment 11 . . 132
and laws of a state, void when . . . 250
CONSTRUCTION, general principles of . . 288–291, 352, 356, 592
of a statute giving discretionary power . . 614
of 25th Sec. of the judicial act of the U. States . 686
CONTRACT, is what 135, 151, 190, 625, 643
implied 478, 482, 650
a grant is a contract executed 135
the charter of a corporation is a contract . . . 207
an alteration of such charter, without the consent of the corporation, is a violation of the obligation of this contract 208–210
binds the parties to the extent of their stipulation . 643
may refer to another instrument, or to a law, for the specification of duties to be performed . . . 481
the motives and the objects of, how far necessary to be expressed 478
if legal on its face, and importing a consideration, it is obligatory till the contrary is shown . . . 479
of an immoral character cannot be enforced . . 628

Page

CONTRACT, *Continued.*
to return money advanced by mistake, is implied, or created, by the law itself 482
there is a power to contract wherever it is necessary to the execution of a public duty 478
may be entered into by the government of the U. States . 477
the obligation of, what 151, 626
origin of the obligation of . . . 651, 655, 658, 662
obligation of, distinct from the remedy . . . 659–662
the remedy may be varied without imparing the obligation 663
how far the law may control the obligation of . . 655
law impairing the obligation of . . 135-138, 625, 645
what laws do not impair the obligation of . . . 656
by what laws it must be governed and discharged . 628, 662
discharge of, or of one of the parties to it, by the bankrupt laws of the country where it was made . . . 628
CONVEYANCE, obtained by fraud 132
CORPORATION, what 115–118
its properties 197
object of an act of incorporation, what . . 198, 408
is a mere creature of law 197
the creation of appertains to sovereignty . . 167
the power of creating may be implied . . 16
may be taxed by the legislature granting its charter, unless expressly exempted . . . 406–411
eleemosynary, see "Dartmouth College against Woodward" 188
COURT, the mere instrument of the law 338
the province of, what 17
the power of, to impose decorum and to punish contempt . 604
federal courts, jurisdiction of 317, 571
may have jurisdiction of offences committed out of a state 143, 146
can revise the proceedings of the executive, legislative, or judicial authorities of the states 540
supreme, of the U. States, has no jurisdiction except that given by the constitution and laws of the U. States . . 33
the final judgment of is conclusive 548
will not inquire respecting the corruption of the sovereign power of a state, in an action between two individuals . . 130
has power to grant a writ of habeas corpus, when . . 40
circuit, of the U. States, jurisdiction of . 317–324, 344, 347

Page

COURT, *Continued.*
state courts, concurrent jurisdiction of 570
may take cognizance of cases arising under the constitution, laws, and treaties of the U. States . 539
territorial courts, how constituted, and their jurisdiction . 374-381
COURTS MARTIAL, of the United States, and of the states . . 573
how appointed 616-619
jurisdiction of, not dependent on war or peace . 620

DARTMOUTH COLLEGE, character of this institution . . 193-200
for whose benefit established . . 199
its charter is a *contract* . . . 208
the obligation of this contract violated, how 208-210
DISCHARGE, obtained in the tribunals of one's own country, under its laws, may be pleaded in any other country . . 651
certificate of, under a bankrupt law . . 671, 674-676
DISCOVERY, the right acquired by 428, 430
DUTIES on imports and exports 298, 358-372
must be uniform . . . 298, 490

EMBARGO, its nature 292
EVIDENCE, what admissible 45, 46, 54, 98, 107
EX POST FACTO LAW, what 137, 518

GEORGIA, has not jurisdiction of the Cherokees . . . 426-447
GOVERNMENT, protection of its subjects one of its first duties . 11
its power to tax is essential to its existence . 180
of the U. States, the basis of 24
is a government of law, not of men . 11
proceeds directly from the people . 163
is supreme within its sphere . 164
its powers 603
its powers are defined and limited . 24
its power to make contracts . 477, 478
acts by its agents . . . 30
may use the most eligible means for paying the debts of the Union . 477
GRANT, is a contract executed 135

HABEAS CORPUS, writ of 33-41

IMPORT, what 360, 459
IMPOSTS, or duties on imports and exports, what . . . 359
must be uniform throughout the United States . . 298, 490
no state may lay any 359

Page

IMPRISONMENT FOR DEBT, right of the states to abolish . . . 681
INDIANS, they are distinct, independent political communities . 444, 445
their condition in relation to the United States . . 414
their title to their lands . . . 141, 264, 277, 281, 285
their usual mode of granting their lands . . . 281
treaties with 434–442
INDICTMENT, what must be alleged in . . . 83, 95, 96
for treason, what must be proved . . . 93, 99
INSPECTION LAWS, are subject to state legislation . . . 300, 359
how applied and executed . . . 360
INTERPRETATION, rule of 360

JUDGMENT, final, what 383
JUDICIAL POWER, as contradistinguished from the power of the laws, it has no existence . . . 338
must be coëxtensive with the legislative power 228
of the U. States, is vested wholly in what courts 21
is extended to what cases 21, 189, 223
depends on what . 112, 223, 227
JURISDICTION, of Congress 144
of a state, coëxtensive with its legislative power . 143
concurrent, of the federal and state courts . . 535, 570
the admiralty, maritime, and criminal jurisdiction of the United States, is exclusive, and cannot be delegated to state courts 535, 591
what is necessary to give jurisdiction to the supreme court of the United States 391, 425
of the supreme court of the U. States . . 21, 23, 33
original and appellate, in what cases . 21, 234, 243, 251, 528
how distinguished 23
of the circuit courts of the U. States . 31, 112, 317, 344, 347
of the district courts of the United States . . 351
of territorial courts 380
of courts martial 619
JURY, trial by 555

LAW, *ex post facto*, what, ... 137, 509–512, 518–520, 522–524
retrospective, what 511
if not ex post facto, may be constitutional . . 690
when void 630
when in its nature a contract, and absolute rights have vested under it, a repeal of the law cannot devest those rights . 134
may devest rights which are vested, when . . . 690
does not enter into a contract, or become a condition of it . 651
operates upon a contract, when 645
may take away the remedy, without impairing the obligation of a contract 661

Page

LAW, *Continued.*
what, impairs the obligation of a contract 625
which varies the construction of an existing contract, is void 630
revenue laws do not apply to privateers 456
a legislative act contrary to the constitution is not law . . 24
giving the United States preference amongst creditors, is constitutional 29,30
of the U. States taxing carriages was constitutional . . 489–503
of N. Hampshire, amending the charter of Dartmouth College, was void 188–210
of Rhode Island, taxing corporations, &c. within the state, was constitutional 405–411
of Connecticut, setting aside a decree of a court of probate, etc., was constitutional 505–524
of N. York, granting to individuals exclusive right to navigate the waters of the state with steamboats, was void 287–314
passed 1811, "for the benefit of insolvent debtors," &c., was void 147–159
of Pennsylvania, for the protection of certain individuals against process of the federal courts, was void . 119–125
providing for the trial by a state court-martial of delinquent militia-men called into the service of the U. States, was constitutional 560–575
reviving the validity of a "Connecticut title" was constitutional 683–691
of Maryland, requiring an importer to take out a license before selling goods imported,—in original packages, &c.,—was void 358-372
taxing the Bank of the U. States, was void . 160–187
giving to the Bank of Columbia a summary remedy for the recovery of notes, endorsed to it, was constitutional 555–559
of Georgia, prohibiting white men to reside in the Cherokee country, without a license, was void . . 419–448
annulling a grant to the "Georgia Company" was void 131–138
of Ohio, taxing the Bank of the U. States, was void . . 315–340
of Missouri, "for the establishment of loan offices," was void . 390–404
LEGISLATURE, the peculiar province of 135
the acts of, are the acts of the people . . 132
the powers of, are given by the people . . 181
extra-territorial power of, limited to its own citizens 426
cannot impair the obligation of contracts . . 133–138
may repeal acts passed by a former legislature . 134
but if an act be done under a law, a succeeding legislature cannot undo it 134

Page

LIBERTY, civil, consists in the right of every individual to claim the protection of the laws whenever he receives an injury 11
LICENSE, meaning, what 307
of vessels in the coasting trade, the object of . . 307–308
granted only to vessels enrolled 306
not necessary to authorize an importer to sell the goods, or merchandise, which he imports, even if a state law prohibit such sale, without such license . . 358–372
LIMITATIONS, statute of 630, 657

MAGISTRATE, when acting must be presumed to have taken oath of office 46
MANDAMUS, writ of, when issued . . . 16, 21, 23, 40, 41
the authority given to the supreme court of U. States to issue writs of mandamus to public officers, not warranted by the constitution . . . 23
what, ... 1 (note), 16, 17
propriety of issuing, determined by what . . 18
MILITIA, laws relating to 561, 583
power of Congress over 560, 578
power of states over 567, 579
when in service of United States 661
call for not the same as employment of . . . 586

NATION, foreign, what 413
NAVIGATION, the power to regulate, is included in the power to regulate commerce 290, 457

OFFICE, definition of 470
appointment to 3, 6, 467
by heads of department . . . 469, 476
OFFICERS, of the U. States, their rights and remedies . . 10, 11, 15
how far amenable to the law . . 14
heads of departments not exempted from being sued, when . . . 18

PATENTEE, may sue in the circuit courts of the United States . 113, 323
PEOPLE of the U. States, their original right to establish a government 24
PIRACY, power of Congress to define and punish . . . 597
definition of 599–601
POSTMASTER GENERAL, may sue in the circuit or district courts of the United States . . . 351, 354
may take bonds of his deputies, &c. . 354
POWER, supreme, what essential to 180
implied powers under the constitution of the U. States . 164, 603
PRESENCE, constructive, in treason 85–93

Page

PRESIDENT of the U. States, his power to appoint officers . . 3–10
shall commission all officers of the U. States 3
cannot withhold a commission from an officer, when . . . 10
his power to call the militia into actual service 612
is the sole judge of the exigency which justifies him in the exercise of this power 612–614
PRIVATEERS, are ships of war 455
not required to make a *manifest* . . . 455
revenue laws are not applicable to . . . 456

RECORD, how to be authenticated and certified . . . 419, 420
an instrument is considered as recorded, when . . 9
REMEDY on contracts 658–663
for injuries 11
REVENUE LAWS, not applicable to privateers . . . 456
RIGHT, when absolute rights have vested under a law which is in its nature a contract, a repeal of the law cannot devest those rights 134
whether *vested* or not, is a judicial question . . . 15
to sell goods imported, in packages, &c. . . . 365

SHIP OR VESSEL OF WAR, this term includes what . . 455
STATE, jurisdiction of 143
sovereignty of, extends to what 181, 386
cannot be made a defendant to a suit brought by an individual 123, 244
the states retain the police power 366
the constitution and laws of, when void . . . 250
is not forbidden, by the constitution of the United States, to pass a bankrupt law 151
the states have power, independent of the constitution of the U. States, to pass bankrupt laws 153
cannot interfere with the regulation of commerce . . 371
cannot tax the importer's occupation 367
cannot tax the Bank of the United States . . . 187, 340
may tax a bank incorporated by the state . . . 405–411
extent of the power of taxation by 386, 410
does not, by becoming a corporator, identify itself with the corporation 345
the District of Columbia is not a state 31
STATUTE, of limitations 629, 657
giving validity to a contract, which, without the statute, would be void, cannot be said to "impair the obligation of the contract" 690

Page

STEAMBOATS are governed by the same laws as other vessels . 312
may be coasting vessels 309–313
SUIT, what 245, 383
to prosecute a suit, what 245
cannot be commenced or prosecuted against the United States . 248
brought in a state court, how removed to courts of U. States . 38

TAXATION, the power of, essential to government . . . 181
the power of, coëxtensive with sovereignty . . 182, 410
power of, still retained by the states, in regard to what . 386, 410
in respect to what the states have not the power of . 182, 367
representation is not made the foundation of, in laying and collecting direct taxes, in the United States . 213
TAXES, provisions of the constitution of the U. States concerning . 212, 490
capitation and other direct taxes, how apportioned . . 213, 490
direct, may be laid and collected in the District of Columbia 217
the tax, or duty, laid on carriages by act of Congress, June 5, 1794, was not a direct tax 490
a tax, or duty, of inspection, what 360
a duty on tonnage is a tax 299
a tax on the occupation of an importer is a tax on importation 367
could not be laid by a state on the Bank of the United States 340
TENANT, may not dispute his landlord's title 689
TREASON against the United States, what . . 42, 43, 47, 50, 60
to constitute the crime, war must be actually levied . 72
there are no accessories to 86
what must be alleged in an indictment for . . 83, 96, 99
what must be proved, and how proved, in the trial for . 93, 99

UNITED STATES, the judicial power of, is vested in what courts . 21, 528
extends to what cases . 26
the appellate jurisdiction of, extends to state tribunals 539
power of borrowing money . . . 384
may make remittances by bills . . . 30
may sue for money had and received . . 479

VESSELS, transporting passengers, have the same rights, and must perform the same duties, as other vessels . . . 310
steamboats are governed by the same laws as other vessels 313
vessels or *ships of war*, this term includes what . . 455

WAR, levying, what 43, 50, 58, 81
WRIT of error 246, 548

Page

WRIT of error, *Continued.*
may be had to remove a judgment in favor of a state or of the United States to a superior tribunal . . 248
a second, does not draw in question the propriety of the first judgment 548
of *habeas corpus*, what 33, 35–38
may be issued when, and by whom . . . 34, 35
the power to award this writ by any of the courts of the United States must be given by written law 34

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